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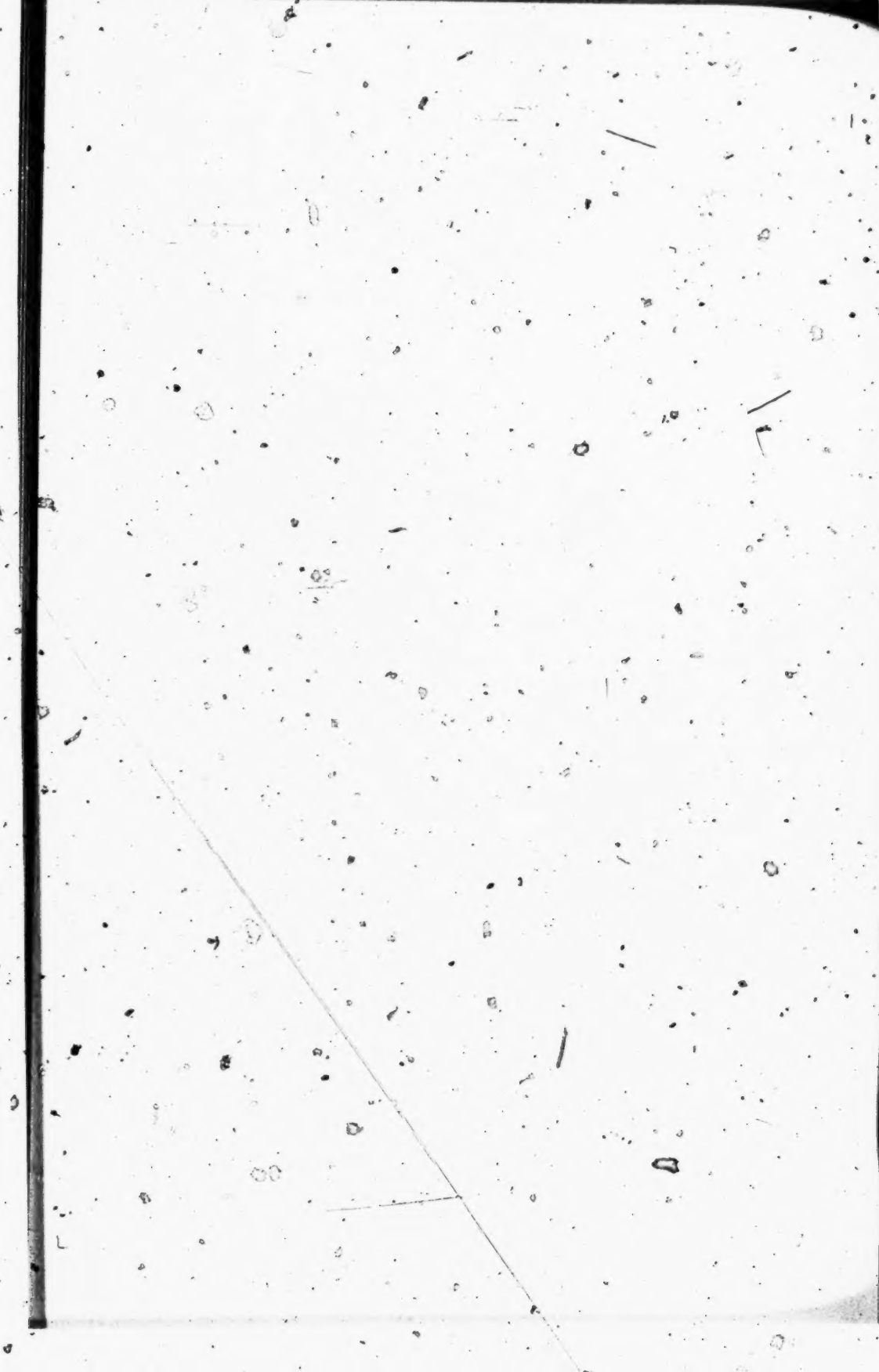
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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 868

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF Ohio, the Wheeling and Lake Erie Railway Company, Eastern Ohio Coal Operators Association et al., appellants

v.

THE UNITED STATES OF AMERICA; INTERSTATE COMmerce Commission, the Baltimore and Ohio Railroad Company, Western Pennsylvania Coal Traffic Bureau et al.

No. 886

THE UNITED STATES OF AMERICA, INTERSTATE COMmerce Commission, the Baltimore and Ohio Railroad Company, Western Pennsylvania Coal Traffic Bureau et al., cross appellants

v.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF Ohio, the Wheeling and Lake Erie Railway Company, Eastern Ohio Coal Operators Association et al.

APPEALS AND CROSS-APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 466) has not yet been reported.

The report of the Commission (R. 17), entitled *Intrastate Rates on Bituminous Coal within State of Ohio,* is published at 192 I.C.C. 413.

QUESTIONS PRESENTED

In a proceeding instituted under section 13 (3) and (4) of the Interstate Commerce Act, upon petition of interstate carriers, and upon four formal complaints by interstate shippers, the Commission found that the intrastate rates on bituminous coal in Ohio, as reduced on and after August 1, 1932, from mining districts in eastern Ohio to destinations in the northeastern part of the State, caused (a) undue preference of intrastate shippers and localities, (b) undue prejudice against interstate shippers and localities, (c) unjust discrimination against interstate commerce, and, by order dated May 2, 1933, required removal of such preference, prejudice, and discrimination by increases in the intrastate rates to the level prevailing immediately prior to the reductions.

The question presented is the validity of this order. Subordinate questions in this connection are:

(1) Whether the Commission's finding of undue preference and prejudice as between persons and localities in intrastate and interstate commerce is supported by substantial evidence.

(2) Whether, apart from the finding of preference and prejudice as between persons and localities, the findings as to revenue losses resulting from the unduly low intrastate rates are sufficient to support the order as one necessary to remove unjust discrimination against interstate commerce from a revenue standpoint.

(3) Whether the Commission's affirmative finding of the reasonableness of the interstate rates from the Pittsburgh, Freeport, Connellsville, and Fairmont districts, considered together with all its other findings, is sufficient to support the order, or whether, as a condition to the removal of the undue prejudice and unjust discrimination found to be caused by the unwarranted disparity as between the reasonable interstate rates from the Pittsburgh, Freeport, Connellsville, and Fairmont districts, on the one hand, and the interstate rates from the Ohio mining districts, on the other hand, it was necessary that the Commission make a further finding as to the reasonableness of all interstate rates from all mining districts in the Inner and Outer Crescents.

(4) Whether the Commission denied the appellants a full hearing by prejudging the question as to the lawfulness of the reduced Ohio rates.

STATUTES INVOLVED

Pertinent statutory provisions are set forth in the Appendix.

NATURE OF APPEALS

No. 868 is a joint appeal from so much of two final decrees of the court below (R. 480, 481) as dismissed, for want of equity, two bills (R. 1, 400) to enjoin and set aside the Commission's order of May 2, 1933 (R. 77). Each of the bills sought also to enjoin and set aside the Commission's order of May 9, 1933 (R. 80, 85) in No. 25885, *Surcharge on Bituminous Coal within the State of Ohio,* 192 I.C.C. 734, but the appeal here does not challenge the decrees below so far as they operated to sustain the validity of that order.

No. 886 is an appeal, herein referred to as a cross-appeal, from the order of the court below dated January 19, 1934 (R. 531) granting a stay of the operation of the Commission's order of May 2, 1933, for a period of 60 days.

PRIOR PROCEEDINGS IN THIS COURT

The order granting the 60-day stay was issued on the same day as the final decrees sustaining the validity of the Commission's orders. Prompt appeal from the stay order was taken to this Court by the United States, the Commission, the interstate carriers and the interstate shippers, who had been parties defendant in the court below, and this appeal was allowed February 3, 1934, by Mr. Justice McReynolds. (R. 533, 536.) Shortly thereafter a motion was filed by these appellants to abate the stay order. This motion was granted

by order of the Court of February 12, 1934, reading as follows:

> On consideration of the motions of the defendants and cross appellants in the above-entitled causes, it is ordered that the orders of the District Court entered in these causes on January 19, 1934, be, and the same are hereby, vacated in so far as they stay the operation and enforcement of the order of the Interstate Commerce Commission. *Virginia Ry. Co.* v. *United States*, 272 U.S. 658, 672–675.

February 16, 1934, the increased intrastate rates required by the Commission's order of May 2, 1933, became effective.

The cross-appeal has therefore served its purpose. We have caused the papers therein to be printed in the transcript (R. 501–547) so that the appeal would formally be made a matter of record in the Court, and with the thought that the Court might desire to refer to the appeal and to its acion upon it in its opinion.

STATEMENT

This case relates to the intrastate and interstate rates of rail carriers on bituminous coal, in carloads, from coal-producing fields in the States of Ohio, Pennsylvania, and West Virginia to points of destination in northeastern Ohio. In this highly industrialized area are many iron and steel and by-product coke plants, the important steel-producing

points being Cleveland, Lorain, Canton, Massillon, Mansfield, and Youngstown, and all of these except Mansfield manufacture by-product coke. (R. 24.) Huge quantities of coal are consumed annually at these points. There is also a large consumption industrially at the important rubber producing city of Akron and at other cities in the area including Huron, Orrville, Rocky River, and many smaller places. (R. 74.) Substantial quantities of bituminous coal are also consumed in this section in household or domestic use.

This coal is drawn from mines in eastern Ohio, in intrastate commerce, and from mines east and south therof, in Pennsylvania, West Virginia, and Kentucky and adjoining States, in interstate commerce.

For rate-making purposes these mines are grouped and the rate groups are usually referred to as districts. The most important Ohio district is the "Ohio No. 8," with 55 active mines. (R. 70.) This district is in the eastern part of the State, its eastern boundary being the Ohio River, and is served by the Baltimore & Ohio, (R. 658) the Pennsylvania, (R. 662) the New York Central, (R. 668) the Wheeling & Lake Erie, (R. 914) and the Pittsburgh & West Virginia railroads. (R. 1150.) These carriers also serve the destination points in northeastern Ohio, either by their own rails and under through routes and joint rates with each other or with other connecting carriers. (Ex.

33, Vol. I of Exs., pp. 159–185.) Northwest of Ohio No. 8 are the "Middle," and "Middle-Coshocton" districts, with 13 and 25 active mines, respectively, and the "Massillon," with one active mine. South of Ohio No. 8 are the Cambridge, Crooksville, Hocking, and Pomeroy districts, with 12, 17, 41, and 9 active mines, respectively. (R. 70.) One or more of the above-mentioned carriers also reach and serve all these various Ohio districts.

Directly across the Ohio River is the Pittsburgh district, extending from the river on the west and embracing the City of Pittsburgh and surrounding territory. Extending southwestwardly from Pittsburgh to eastern Kentucky, in the shape of an arc of a circle, are a group of districts, known collectively as the Inner Crescent districts. Other districts, forming a large arc, are known as the Outer Crescent. Included in the Inner Crescent are the following districts, with the number of active mines in each shown in parentheses: Pittsburgh (151), Freeport (8), Connellsville (78), Fairmont (117), Kanawha (149), Kenova (16), Thacker (42). In the Outer Crescent are included the New River (116), Pocahontas (62), Tug River (31). (There are other districts in the Inner and Outer Crescents; see Appendix A of Commission's report, R. 70–73.)

The Freeport district is in Pennsylvania, adjoining the Pittsburgh district on the north. Connellsville is the next district south of the Pitts-

burgh, and is also in Pennsylvania. The Fairmont district is in West Virgina, directly south of the Connellsville.[1]

These districts in the Inner and Outer Crescents are served by various carriers including the Baltimore & Ohio, the Pennsylvania, the New York Central, the Pittsburgh & Lake Erie, The Chesapeake & Ohio, Norfolk & Western, etc. In many instances there is a single-line haul from the mine to the northeastern Ohio destination. For instance, the B. & O. has its own rails into and serves the Pittsburgh, Connellsville, Fairmont, and other districts, and its rails reach and serve Cleveland, Lorain, Akron, Canton, Massillon, and Mansfield. (R. 658.) The rails of the B. & O. also reach and serve a number of the Ohio districts, including not alone the Ohio No. 8 but also the Middle, Massillon, Cambridge, and others. (R. 658.) As stated in the Commission's report (R. 24–25):

> Northeastern Ohio is served principally by the Pennsylvania, the New York Central, The Baltimore & Ohio, the Wheeling, and the Nickel Plate-Erie system. All of these carriers participate both in the rates and

[1] Exhibit 22 in the Commission's record (Vol. I of Exhibits, page 143) clearly shows these various districts as well as the Ohio coal-producing districts. The map opposite page 1 of appellants' brief, prepared from Exhibit 22, appears to be accurate. A good map showing the various districts in colors will also be found in the Commission's report in *Bituminous Coal to C.F.A. Territory*, 46 I.C.C. 66.

the transportation of bituminous coal from Ohio mines as well as from the Inner Crescent and Outer Crescent mines to northeastern Ohio.

Prior to August 1, 1932, there had been established and maintained what the court below described as "a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the western Pennsylvania, northern West Virginia and Ohio coal-mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable. in view of all the elements which must be considered in rate making." (R. 467.) Under this adjustment the rate from Ohio No. 8 to Cleveland, as a typical rate, was $1.74 per net ton, while the rate from the Pittsburgh district to the same destination was $1.84. (R. 22, 70, 71.) The difference in the two rates was 10 cents a ton in favor of Ohio No. 8, and inasmuch as this difference had prevailed for many years, remaining constant regardless of the level of the respective rates, it had come to be recognized as a "fixed differential." Similarly, there has been a definite differential relationship between the rates from the Pittsburgh, Connellsville, and Fairmont districts, the rate from Connellsville, $1.90, being 6 cents more than that from Pittsburgh, and that from Fairmont, $1.99, 9 cents more than from Connellsville. (R. 24, 71–73.) Thus, Ohio No. 8's differential

was 10 cents under Pittsburgh, 16 cents under Connellsville, and 25 cents under Fairmont.[2]

There is also a relationship as between the Ohio districts. For example, the Hocking district takes a differential of 15 cents over Ohio No. 8 to Cleveland. (R. 58.) Prior to August 1, 1932, the Hocking district rate to Cleveland was $1.89, or 15 cents higher than the $1.74 rate from Ohio No. 8, and when the latter rate was reduced to $1.45, a like reduction was made in the Hocking district rate, to $1.60, maintaining the relationship. (R. 70–71.)

From the southern groups in the Inner and Outer Crescents to destinations such as Toledo and Cleveland the rates are made differentially over Ohio districts. For example, from the Inner Crescent groups to Toledo and Cleveland the rate is 50 cents a ton higher than the Hocking or Pomeroy districts, while the differential from the Outer Crescent is 75 cents. The rate from the Hocking district to Toledo is $1.89. This rate is also applied to Cleveland. The addition of the above-mentioned differentials to this rate results in the rates of $2.39 from the Inner Crescent and $2.64

[2] To Cleveland the rate from the Freeport district was the same as from the Pittsburgh district. From the more southerly districts the rates were much higher, e.g., to Cleveland from the Kanawha, Kenova, and Thacker districts, $2.39; and from the New River, Pocahontas and Tug River districts, $2.64. For a full statement of the rates see Appendix A to the Commission's report, R. 70–73.

from the Outer Crescent to Toledo and Cleveland. (R. 24, 58, 72–73, 586.)

The general rate adjustment here involved was last considered by the Interstate Commerce Commission (prior to the investigations here involved) in *Ohio-Michigan Coal Cases,* 80 I.C.C. 663, decided June 8, 1923, and, among other things, the relationship between Ohio intrastate bituminous coal rates and the interstate rates here involved was considered, the Commission finding that there were no conditions affecting the transportation of coal from the Ohio mines which justified the maintenance of a different basis of rates for such transportation in intrastate and interstate commerce, respectively, to the Ohio destinations considered (*ibid.,* page 690; and see R. 574–576), but no order relating to the intrastate rates was then made and it was left to the Ohio Commission to complete the removal of the undue preference and prejudice and unjust discrimination against interstate commerce and "restore the rate parity formerly existing." (*Ibid.,* 690.) Rates and relationships between many of the particular points and groups involved in the case at bar were readjusted in pursuance of the Commission's findings in that case (R. 575), and apparently the resulting adjustment was satisfactory to all concerned, for the adjustment remained in force, without complaint, continuously for 8 or 9 years.

The reductions in the Ohio intrastate rates

Then, effective August 1, 1932, the Ohio Commission reduced the rates from three Ohio districts—Ohio No. 8, Massillon and Middle—to two Ohio destinations, namely, Massillon City and Canton. These reductions ranged from 4 to 29 cents a ton. (R. 21,70.)

Prior to the effective date of these reduced rates, the Wheeling & Lake Erie [3] sought permission of the Ohio Commission to establish reduced rates from its mines in Ohio No. 8, Middle-Coshocton, and Massillon districts to Cleveland, Huron, Lorain, and Akron, and certain intermediate points. This permission was granted by the Ohio Commission, and the reductions, ranging from 19 to 46 cents a ton (R. 21, 70), became effective August 1, 1932.

Immediately following these reductions the Pittsburgh & West Virginia sought and obtained permission from the Ohio Commission to reduce its rates a similar amount from mines on its lines in the Ohio No. 8 district to the same destinations, and these reductions took effect August 12, 1932. (R. 21.)

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[3] Hereinafter called the Wheeling. The lines of this carrier are wholly within the State of Ohio. Its lines serve mines in the Ohio No. 8, Middle, Massillon, and Crooksville districts in Ohio and reach Cleveland, Lorain, Huron, Canton, Massillon, Orrville, and also Akron in connection with the Akron, Canton & Youngstown Ry. from Mogadore. (R. 913 and Ex. 141, Vol. III of Exs., p. 25.)

[4] The P. & W. V. extends from Pittsburgh and Connellsville, Pa., to Pittsburgh Junction, O., where it connects

The three Ohio districts above mentioned, Ohio No. 8, Middle-Coshocton, and Massillon, from which the Wheeling and the P. & W. V. reduced their rates in substantial amounts as above shown, are also served by the B. & O., the New York Central and the Pennsylvania. (R. 658, 662, 668.) Unless their rates were reduced in the same amounts as those of the Wheeling and the P. & W. V. they could not hope to obtain any of the traffic where their lines served the same mines, and competing mines served by their lines in the same districts would be subjected to a serious disadvantage. (R. 559–561.) To meet the competition of the Wheeling and the P. & W. V., those three lines sought and obtained permission from the Ohio Commission also to reduce their rates from Ohio No. 8, Middle-Coshocton, and Massillon districts to Cleveland, Lorain, Huron, Akron, Rocky River, and Orrville. These reductions were substantially the same as made by the other carriers, and became effective September 2, 1932. (R. 22.)

It will be noted the above-mentioned reductions applied from only three Ohio districts. This threw the rates from the other Ohio districts out of line and obviously put the mines in those other districts

with the Wheeling. Rates from mines on its line in the Pittsburgh district and in the Ohio No. 8 to Cleveland and the other destinations above mentioned are joint rates with the Wheeling. The P. & W. V. published the reduced joint rates referred to under a blanket concurrence or power of attorney from the Wheeling.

at a disadvantage. (R. 562–563.) In view of this situation the Ohio Commission instituted a general investigation, and on September 29, 1932, required the B. & O., the Pennsylvania, the New York Central, the Wheeling, and the P. & W. V. to reduce their rates from the Cambridge, Crooksville, and Hocking districts by substantially the same amounts as the reductions from the Ohio No. 8 district to the same destinations. (R. 22.)

A month later, or on October 28, 1932, the Ohio Commission required the New York Central to reduce its rates from the Pomeroy district to northeastern Ohio by substantially the same amounts as the reductions from the Ohio No. 8. (R. 22.)

Previously, on August 20, 1932, the B. & O. had been required by the Ohio Commission to reduce its rate from the Cambridge district to Mansfield from $1.76 to $1.51. (R. 22.)

To the typical destination of Cleveland the intrastate reductions were, from Ohio No. 8 and Cambridge districts $1.74 to $1.45; from the Middle and Middle-Coshocton districts $1.54 to $1.22; from the Massillon district $1.54 to $1.08; from the Crooksville district $1.76 to $1.47; from the Hocking and Pomeroy districts $1.89 to $1.60. From each of these districts reductions were also made to Lorain, Huron, Canton, Massillon, Akron, and Mansfield, in the amounts as shown in Appendix A of the Commission's report (R. 22, 70–71).

The record shows that following the first reductions by the Ohio Commission, reductions were made from all the other Ohio districts involved herein to northeastern Ohio. The first reductions brought about discriminations and each of the succeeding reductions was for the purpose of removing the discrimination, until finally the Ohio intrastate rates from all the Ohio districts to the various destinations in northeastern Ohio were reduced.[5] (See Exhibits Nos. 2, 3, 4, 5 and 6, Vol. 1 of Exs., pp. 24–43.)

Process of successive rate reductions in Ohio to remove discriminations, precipitated by first reductions, stopped at State line

But this process of rate reductions, required or authorized by the Ohio Commission for the purpose of removing discrimination, stopped at the State line. That was as far as the authority of the Ohio Commission extended. No corresponding reductions were made in the interstate rates from the mining districts beyond the Ohio State line,[6] and, in order to obtain relief from the discriminations brought about against them by reason of the reductions in Ohio, the interstate shippers were com-

[5] Although Youngstown is in northeastern Ohio, defined as the territory east of a line drawn from Sandusky through Galion to Columbus, and north of an east-west line from Columbus to the Ohio-Pennsylvania State line, there were no reductions in the intrastate rates to that point. (R. 20, 76.)

[6] Except in the case of the P. & W. V. from mines on its lines in the Pittsburgh district. (R. 23.)

pelled to appeal to the Interstate Commerce Commission, the only body having jurisdiction over the interstate rates. The interstate carriers also appealed to the Interstate Commission for relief.

Petition to the Commission under section 13(3) by the interstate carriers

By petitions filed with the Commission on September 13 and October 22, 1932, (R. 1848, 1857) 12 carriers serving the Ohio and Inner and Outer Crescent districts [7] alleged that by reason of the various rate reductions required by the Ohio Commission, there had been brought about and created an undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand, and an undue, unreasonable and unjust discrimination against interstate commerce and an undue burden upon interstate commerce, in violation of sections 3 and 13 of the Interstate Commerce Act.

Their petition further alleged that the intrastate traffic on bituminous coal within the State of Ohio

[7] Baltimore & Ohio Railroad Company; Chesapeake & Ohio Railway Company; Erie Railroad Company; The Monongahela Railway Company; New York Central Railroad Company; New York, Chicago & St. Louis Railroad Company; Norfolk & Western Railway Company; Pennsylvania Railroad Company; Pittsburgh, Chartiers & Younghiogheny Railway Company; Pittsburgh & Lake Erie Railroad Company; Western Maryland Railway Company; Virginian Railway Company.

and to and from that State constitutes a large and important part of their traffic amounting annually to many millions of tons, and that the revenue loss resulting from the action of the Ohio Commission in reducing the intrastate rates would amount in the aggregate to several millions of dollars annually. The petition prayed that the Commission institute an investigation and enter an order to remove the undue preference and prejudice and unjust discrimination.

Order instituting section 13 investigation

By order dated October 3, 1932 (R. 1855) as amended by order of December 7, 1932 (R. 1871) the Commission instituted such an investigation. Under the terms of this order the Commission entered upon an investigation—

> to determine whether the existing rates on bituminous coal, in carloads, from Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking, and Pomeroy districts to destinations in northeastern Ohio, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, and intermediate points required, authorized or permitted to be maintained by the Public Utilities Commission of Ohio cause or will cause any unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or

> any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and also to determine what rates and charges, if any, or what maximum or minimum or maximum and minimum shall be prescribed to be charged between said origins and destinations for such transportation in order to remove such advantage, preference, prejudice, or discrimination, if any, as may be found to exist. (R. 1872.)

All railroads subject to the Commission's jurisdiction operating within the State of Ohio were made respondents to the proceeding. (R. 1872.) This included the 12 carriers who had petitioned the Commission, and they are referred to in the report as "petitioning respondents." The Wheeling & Lake Erie who for its own reasons was in favor of the redued Ohio intrastate rates was not among the petitioners; nor was the P. & W. V.

Formal complaints by interstate shippers alleging violations of sections 1, 3, and 13(4) of the Act

Shortly thereafter, four formal complaints were filed by or on behalf of bituminous coal operators in the Inner and Outer Crescents. All of these complaints alleged that the reduced Ohio intrastate rates, in their relation to the interstate rates, were unduly preferential of Ohio shippers and localities, unduly prejudicial against interstate shippers and localities, and unjustly discriminatory against interstate commerce, in violation of

sections 3 and 13 of the Act.[8] (R. 43–44.) Three of these complaints also alleged that the interstate rates to northeastern Ohio from complainants' mines in the Pittsburgh, Freeport, Connellsville, and Fairmont districts were unreasonable, in violation of section 1 of the Act. The fourth, filed by Property Owners' Committee in behalf of bituminous coal producers whose mines are located in the Pocahontas, Tug River, New River, Winding Gulf, Williamson (or Kenova-Thacker), Kanawha, and Logan districts of West Virginia, did not allege unreasonableness of the interstate rates, nor did any of the other formal complaints raise the issue of the reasonableness of the interstate rates from those districts. (See statement of the issues in these four formal complaints, (R. 43–44.)

Hearings in consolidated cases

The four formal complaints of the interstate shippers were consolidated with and heard jointly on a common record with the general 13th section proceeding instituted in response to the carriers'

[8] These four formal cases were as follows: No. 25590, *Western Pennsylvania Coal Traffic Bureau et al.* v. *Akron, Canton & Youngstown Ry. Co. et al.* (R. 1987); No. 25656, *H. W. Showalter, Receiver, Continental Coal Co. et al.* v. *Akron, Canton & Youngstown Ry. Co. et al.* (R. 2014); No. 25657, *Property Owners' Committee et al.* v. *Akron, Canton & Youngstown Ry. Co. et al.* (R. 2036); and No. 25670, *Robert C. Hill et al., Domiciliary Receivers of Consolidation Coal Co. et al.* v. *Akron, Canton & Youngstown Ry. Co. et al.* (R. 2047).

petition. Hearings were held at Columbus, Ohio, December 12 to 21, 1932, at Washington, January 3 to 13, 1933, and again at Columbus, February 6 to 17, 1933. A voluminous record was developed, disclosing the facts and circumstances attending the interstate and intrastate transportation involved in almost infinite detail.[9]

Thereafter briefs were filed and the case was orally argued.

May 2, 1933, the Commission issued its report and order, ten commissioners concurring and one dissenting.

Summary of Commission's ultimate findings

The Commission found that the destination territory involved embraces a highly industrialized area in which active competition exists between industries producing similar products, particularly those producing iron and steel and by-product coke (R. 24); that these industries, which compete also with like industries in other States, consume huge tonnages of coal (R. 24, 25, 74–75), which is drawn from Ohio mines in intrastate movement and from mines in the Inner and Outer Crescents in interstate movement (R. 25); that northeastern Ohio is served principally by the Pennsylvania, the New York Central, the Baltimore & Ohio, the Wheeling, and the Nickel Plate-Erie system, and all of these

[9] The testimony covered 3,297 typewritten pages; and over 400 exhibits were introduced.

carriers participate both in the rates and the transportation of bituminous coal from Ohio mines as well as from the Inner Crescent and Outer Crescent mines in Pennsylvania, West Virginia and other States to northeastern Ohio (R. 24–25); and that there is a substantial movement of coal from the Ohio, Pennsylvania, and West Virginia mines to such destinations (R. 63).

Upon a full showing of the rates, past and present, and of the distance from the various mining districts involved, and upon voluminous evidence disclosing in detail the transportation conditions under which the coal moves from the respective state and interstate origins, the Commission concluded and found that the coal is transported from the Ohio mines to the destinations in northeastern Ohio "at intrastate rates which are generally substantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia," (R. 63) and that "this disparity in rates is greater than is warranted by differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other." (R. 63.)

Intense competition exists as between the Pennsylvania and West Virginia producers, on the one hand, and the Ohio producers, on the other, in the sale of coal at the northeastern Ohio consuming

points, for both steam and domestic use. "The record definitely establishes," the Commission found, "that coal from Pennsylvania, West Virginia, and Ohio mines is highly competitive at Cleveland and other destinations in northeastern Ohio to which the assailed rates apply." (R. 63, 25, 27.)

While the interstate shippers could shrink their profits to meet the differences in rates that existed prior to August 1, 1932, the reductions effected on and after that date in the Ohio intrastate rates made those rates so much lower than the interstate rates from the crescent districts that it was virtually impossible for the interstate shippers to meet the Ohio competition. Substantial losses of business, shrinkage of profits and other injury to the interstate shippers resulted. (R. 26–27, 44, 51, 55, 56, 58–59.) Business lost by the interstate shippers was gained by the Ohio shippers. (R. 27, 55, 58, 59, 63.) The Commission found that as a result of the rate reductions in Ohio, the mining properties in the other States, which had been located and developed with heavy investments in facilities under the rate relationships existing prior to the reductions in Ohio, "are now being financially and physically seriously affected." (R. 61–62.)

Based upon this showing of a rate disparity greater than warranted by transportation conditions, of competition between the respective state

and interstate shippers, of undue advantage to the intrastate shippers, and of injury to the interstate shippers, the Commission found "that the intrastate rates here in issue from eastern Ohio districts to the destinations in northeastern Ohio as defined in this report, are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio." (R. 64.)

Giving consideration to section 15a, the Commission found that the carriers were not earning a fair return. For the year 1931, the last full year prior to the hearing, the carriers in the eastern district, including those in the Pocahontas region, earned a return of only 2.24 percent. (R. 59.) Exclusive of the Pocahontas lines, the rate of return was 1.89 percent. (R. 59.) For the first three quarters of 1932, the carriers earned no return at all but operated at large deficits. During this period 43 out of a total of 68 class I railroads in the eastern district operated at a loss. The total deficit for this period on the lines in the eastern district as a whole was $25,720,000 under fixed charges. The aggregate deficit of the 43 lines that so operated at a loss was $68,443,416. The aggregate deficit of 8 roads affected by the reduced Ohio rates on coal was $29,598,000 or approximately 42 percent of the total.

Only one line, the Pennsylvania, among those affected by the reduced rates on coal, had a surplus after payment of fixed charges, and this surplus was only slightly greater than the revenue accruing to it under the emergency surcharges recently authorized for a temporary period. (R. 60.)

The Commission further found that bituminous coal constitutes a large and extremely important part of the traffic of the interstate railroads involved, the percentages of bituminous coal to all freight in 1931 being 45 percent on the Baltimore & Ohio, 42 percent on the New York Central, 41 percent on the Pennsylvania, and 55 percent on the Pittsburgh & Lake Erie (R. 27) and even larger percentages on some of the other roads (R. 51, 61); that if the interstate rates from mines in Pennsylvania and West Virginia to Cleveland, Lorain, Akron, Canton, Massillon, Alliance, and other important consuming points in northeastern Ohio were reduced by the same amounts as the Ohio intrastate rates had been reduced, the losses of revenues based on the 1931 tonnage would be $516,400 on the Pennsylvania; $202,666 on the New York Central; $331,375 on the Pittsburgh & Lake Erie, $215,000 on the Baltimore & Ohio; and, estimated on the 1929 tonnage, about $500,000 on the Norfolk & Western. (R. 60.)

If a corresponding reduction were made in the interstate rates to all destinations in central territory, it would result in a loss of revenue based on

1931 tonnage of $3,434,745 for the Pennsylvania, $1,271,291 for the New York Central, and $1,938,044 for the Pittsburgh & Lake Erie. (R. 60.)

Any change in the rates from the origin groups in question would disturb the entire adjustment involved. "While the rates only to northeastern Ohio are assailed, yet any finding as to that territory would reflect itself immediately to the territory beyond, possibly altering the adjustment as far as Chicago." (R. 63.) Huge tonnages of coal move from the mining fields involved to the highly industrialized area of northeastern Ohio (R. 25, 26, 27, 40, 51, 55, 56, 61, 74–75) and to related territories (R. 61).

Far greater losses would result, the Commission found, if the reductions were reflected to related territories (R. 61). If these reductions "spread to other interstate fields, herein affected, the estimated losses to the carriers would be $44,108,248.61 and $29,649,265.34, based on the 1929 and 1931 tonnages, respectively." (R. 27–28.)

As to the Ohio intrastate commerce, it was found that the former rates did not impede the movement of the traffic but that, on the contrary, the record fully established that coal had moved freely between Ohio points under the rates in effect prior to the reductions. (R. 62.)

It was further found "that the Ohio intrastate traffic under these assailed rates [i.e., the reduced Ohio intrastate rates] is not contributing its just

proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled." (R. 63–64.) Illustrative of these losses is the finding that the reduced intrastate rates, based on the intrastate coal tonnage to the principal consuming points in Ohio in 1931 over one road alone, the Baltimore & Ohio, would result in a reduction in the revenues of this carrier of $226,000. (R. 60.)

These losses in revenue, and the much greater threatened losses that would grow out of reductions in the interstate rates in issue, and other rates sensitively related thereto, corresponding to those made in the Ohio intrastate rates, were in the face of the current large deficits under fixed charges then being sustained by the railroads affected.

Considering the question of the reasonableness of the interstate rates, the Commission found that prior to the reductions in the Ohio intrastate rates coal had moved freely in interstate commerce from the inner and outer crescent districts to northeastern Ohio in substantial volume; that the interstate rates, assailed as unreasonable, had not, prior to the Ohio reductions, prevented a substantial movement of coal to these Ohio destinations greatly in competition with Ohio mines; that under such circumstances and in view of the closely woven relationships of these rates under which the industry in this territory has been fostered, and particu-

larly the present economic condition which also has affected the railroads adversely, only the most convincing evidence would warrant the disruption of the long-existing relationship of rates or the reduction of the interstate rates, and that this convincing proof did not appear on the record (R. 62–63). Based upon these considerations and upon elaborate testimony showing the distances, the volume of the movement, the cost and value of the service, the history of the rates, the nature of the rate structure, competitive and transportation conditions, the financial conditions of the carriers, the revenues, and other matters relevant to the question of the reasonableness of the rates, developed in great detail, including comparisons with numerous other rates on coal in the same and other territories, many of which had been prescribed or approved by the Commission in previous proceedings, the Commission found that the assailed interstate rates from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to the northeastern Ohio destinations are reasonable rates. (R. 64.)

"The record fully establishes," the Commission found, "that the Ohio reductions constitute a real discrimination against and obstruction to interstate commerce," and that "the assailed Ohio intrastate rates result and will result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the Act."(R. 64.)

Finally, it was found (R. 64) that "such undue preference and prejudice and unjust discrimination should be removed by the establishment and maintenance of intrastate rates from the points or groups and to the destination territory from and to which the assailed intrastate rates apply which are no lower than the specific rates or rates on the basis set forth in Appendix D." (Appendix D, R. 76, requires the restoration of the intrastate rates in effect prior to August 1, 1932.)

The Commission order here involved

To carry its findings into effect the Commission issued with and as part of its report of May 2, 1933, an order (R. 77–78) which, after making certain recitations, provided:

> *It is ordered,* That said respondents according as they participate in the transportation be, and they are hereby, notified and required to cease and desist upon [from] practicing the undue prejudice as between persons and localities and undue, unreasonable, and unjust discrimination against interstate commerce found in the said report to exist in the relation between the interstate rates on bituminous coal, in carloads, from Pennsylvania and West Virginia to destinations in Ohio, on the one hand, and the intrastate rates on like traffic between points in Ohio as indicated in the said report, on the other, and to establish, on or before June 10, 1933, upon notice to

this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the intrastate transportation of bituminous coal, in carloads, from and to the said points in Ohio rates which shall not be less than the rates or bases of rates prescribed as minima in the said report and set forth in Appendix D [10] thereto; provided, that to the specific rates, or the rates resulting from the bases of rates, found in the said report to be minima for intrastate application as aforesaid, should be added the emergency rates or charges authorized in the *Fifteen Per Cent Case, 1931*, 178 I.C.C. 539; 179 I.C.C. 215; 191 I.C.C. 361; provided, the emergency rates or charges so authorized have been or are contemporaneously added to the interstate rates from Pennsylvania and West Virginia districts to the same destinations.[11]

And it is further ordered, That this order shall continue in force until the further order of the commission.

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[10] (R. 76.)

[11] At the time of the reductions in the Ohio intrastate rates—August to October, 1932—the surcharge of 6 cents per ton applied in connection with the Ohio intrastate rates as well as in connection with the interstate rates, this surcharge having been authorized by the Interstate Commerce Commission and by the Ohio Commission to apply until March 31, 1933. By supplemental report in *Fifteen Per Cent Case, 1931*, the Interstate Commerce Commission further authorized the surcharges on interstate traffic, includ-

Proceedings in Court below

The Commission's orders of May 2 and 9, 1933, both bore effective date June 10, 1933. The bills to enjoin them were filed prior to that date. Hearing on the bills before the three-judge court was held June 3, 1933. At the request of the court the Commission postponed the effective date of both orders for 30 days, or until July 10, 1933. (R. 399.) On July 7, 1933, the court issued temporary in-

ing bituminous coal, until September 30, 1933. The Ohio Commission refused to extend the surcharges and they expired on Ohio intrastate traffic on March 31, 1933. As a result, the Ohio rates on bituminous coal became still lower than the interstate rates by 6 cents. This further increased all of the differentials in favor of the Ohio districts accordingly. Taking Ohio No. 8 as an example, it will be recalled that prior to August 1, 1932, the differentials of Ohio No. 8 under the Pittsburgh, Connellsville and Fairmont districts were 10, 16, and 25 cents per ton, respectively. (R. 24, 46, 51, 52, 56.) As the result of the reduction of 29 cents per ton in the rate from Ohio No. 8 to Cleveland on August 1, 1932, these differentials became 39, 45, and 54 cents, respectively. Then on March 31, 1933, as the result of the cancellation of the surcharge on Ohio intrastate traffic and its continuance on the interstate traffic these differentials were further increased to 45, 51, and 60 cents, respectively. These last-named differentials were in effect at the time the above-quoted order was entered—May 2, 1933. Subsequently, on September 30, 1933, the surcharges on interstate traffic expired, and this operated to reduce the disparity as between the intrastate and interstate rates prevailing at that time by 6 cents.

All rates stated in this brief, interstate and intrastate, are or were the basic rates, to which the surcharge if applicable was added. Likewise the rates stated in the Commission's report did not include the surcharge. (R. 20.)

junctions enjoining the operation of both orders until the further order of the court. (R. 399, 464.) January 6, 1934, the court rendered its opinion sustaining the validity of both orders. (R. 466.) Meanwhile the order of May 9, 1933, requiring the surcharges, expired by its own limitation on September 30, 1933, (R. 467) and hence never became effective.

Final decrees vacating and setting aside the temporary injunctions and dismissing the bills were issued January 19, 1934. (R. 480, 481.)

On the same date the court issued orders which while denying applications as made for a stay of the operation of the order of May 2, 1933, until the determination of the appeal in this Court, granted a stay for a period of 60 days. (R. 531.)

The court also made separate findings of fact (R. 473) and conclusions of law. (R. 477.)

SUMMARY OF ARGUMENT

I. The substantial rate reductions in the Ohio intrastate rates resulted in serious discrimination against interstate shippers, caused large decreases in the revenues of the carriers, and threatened further revenue reductions of such great magnitude as to constitute a real menace to the maintenance by the carriers concerned of adequate interstate railway service. The Ohio reductions, usually amounting to 29 cents per ton for the longer hauls, without any reduction in the interstate rates from competitive

fields, threw the entire rate structure out of balance, operated to create a competitive advantage in behalf of the Ohio mines and operators and, by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations, by placing them at a competitive disadvantage. The interstate producers could shrink their profits to meet the prior differences in rates in favor of the Ohio operators, but after the reductions the Ohio rates were so much lower that it was impossible for the interstate shippers to meet the Ohio competition. The concrete instances set out in the Commission's report of loss of business, loss and shrinkage of profits and other injury to the interstate shippers are ample to illustrate the injurious effect upon interstate commerce resulting from the great disparity between the state and interstate rates. This disparity was found by the Commission to be greater than warranted by the differences in transportation conditions from the state and interstate origins, respectively.

Having found upon consideration of the whole record that the intrastate rates were generally substantially lower, distance considered, than the interstate rates, that the disparity was greater than warranted by transportation conditions, and that the intrastate rates were and would be for the future unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate

shippers and localities, it was the Commission's duty, under section 13 (4) of the Interstate Commerce Act, to prescribe the rate thereafter to be charged which in its judgment would remove such preference and prejudice. This could have been accomplished by reducing the interstate rates, *American Express Co.* v. *Caldwell,* 244 U.S. 617, 624, but, upon consideration of the exceptionally full record, the Commission found that the interstate rates from the Pittsburgh district, which was the base group, as well as from the Freeport, Connellsville, and Fairmont districts, which were differentially related to the base group, were reasonable rates. In removing injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. *Shreveport* case, 234 U.S. 342, 355. The order in question, made under section 13 (4), which vested the Commission with a direct power to remove any undue, unreasonable, or unjust discrimination against interstate commerce, *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R.,* 257 U.S. 563, 586, prescribed the specific rates to remove the discrimination, requiring the intrastate rates to be raised to their former levels, at which they were fairly aligned with the reasonable interstate rates, rather than requiring reductions in the reasonable interstate rates. In so requiring, the Commission gave

consideration to other matters and made other findings.

It found that coal had moved freely under the interstate rates then in effect and which had been in effect for a long time. It also found that there had been a free movement under the intrastate rates which had long existed prior to the reductions. It gave consideration to the financial condition of the carriers, to the fact that in 1931 they had earned less than a fair return, and to the fact that in the first three quarters of 1932 they had earned no return but operated at large and alarming deficits under fixed charges; that bituminous coal constitutes an extremely important part of the traffic of the interstate railroads involved, averaging nearly 50 percent on such important systems as the Baltimore & Ohio, the New York Central, the Pennsylvania, the Pittsburgh & Lake Erie. It further took into consideration the substantial revenue losses which the carriers would suffer if corresponding reductions were made in the interstate rates. Further, as indicated in the report reductions in the particular interstate rates involved would probably result in other reductions, in view of the closely woven relationships between these rates and other coal rates in the same general territory, and, if the Ohio intrastate rate reductions continued and like interstate reductions spread to other affected interstate fields, the estimated revenue losses to the carriers would range from about 29

million dollars to about 44 million dollars dependent upon whether the tonnage was equivalent to that in 1929 or 1931, respectively. This would have offset a substantial part, possibly a fourth or more, of the entire additional revenue expected to be realized from the countrywide application of the emergency surcharges which had been recently authorized. *Fifteen Per Cent Case, 1931,* 178 I.C.C. 539, 179 id. 215, 191 id. 361; *Increase in Intrastate Rates* 186 I.C.C. 615, *United States* v *Louisiana,* 290 U.S. 70.

The losses in revenue resulting from the reduction of the intrastate rates, and the much greater threatened losses that would grow out of reductions in the interstate rates in issue, and other rates sensitively related thereto, corresponding to those made in the Ohio intrastate rates, were of such great magnitude as to constitute a real menace to the maintenance by the carriers concerned of adequate transportation service. Section 15a as in effect at the time of the order contemplated rates that would enable carriers to earn a fair return, in the interest of adequate national railway service. *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R.,* 257 U.S. 563, 585; *United States* v. *Louisiana,* 290 U.S. 70. Under the subsequently enacted Emergency Railroad Transportation Act, 1933, the Commission is to consider, among other factors, "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent

with the furnishing of such service"; and "to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." "The new act discloses no intention to weaken national control for essential national purposes over the railway systems of the country. It was rather decided to aid that control in the light of the depressed economic condition of the railways." *Florida* v. *United States*, — U.S. —, decided April 2, 1934.

II. The order under consideration, requiring increases in the intrastate rates in order to remove (a) undue prejudice against interstate shippers and localities, and (b) unjust discrimination against interstate commerce from a revenue standpoint, is supported by adequate findings as to both types of prejudice or discrimination. This order is not statewide in scope, but relates only to the rates from mining districts in eastern Ohio to destinations in northeastern Ohio from and to which the intrastate rates were reduced on and after August 1, 1932. Discrimination was shown in respect of all these rates, and thus the order is sustainable as one necessary to remove undue preference and prejudice as between state and interstate shippers and localities. The adequacy of the Commission's findings in this respect seems not open to reasonable dispute, being the same in substance as those made and found adequate in many cases of this character, including *Louisiana Comm.*

v. *Tex. & N. O. R.*, 284 U.S. 125. If these findings are adequate and the order is otherwise valid viewed in the single aspect as one to remove such preference and prejudice, then it is unnecessary to consider the adequacy of the findings respecting revenue losses supporting the ultimate finding of unjust discrimination against interstate commerce from a revenue standpoint. It is submitted, however, that those findings are sufficient. The Commission found "that the Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled."

This finding was supported by an exhibit of record showing the intrastate tonnages in 1929 and that the revenue losses to the carriers resulting from the reductions in the intrastate rates if applied to those tonnages, would aggregate $881,749.60. The Commission did not, however, show this figure in its report. It did expressly find with respect of one railroad alone, the Baltimore & Ohio, that the reduced intrastate rates based on its intrastate coal tonnage to the principal consuming points in Ohio in 1931, would result in a reduction of $226,000 in the revenues of this line. This finding is sufficiently illustrative of the losses that the other carriers would likewise sustain as the result of the reduced intrastate rates. This specific finding

of the revenue loss in the case of this one railroad, amounting to $226,000 in its revenues based on one year's business, coupled with the more general finding that the Ohio intrastate traffic was not contributing its just proportion to the revenues of the carriers, and by reason of that fact they were suffering *substantial* losses in their revenues to which they are justly entitled, is sufficient to support the order as one requiring removal of unjust discrimination against interstate commerce from a revenue standpoint, especially when the order is also supported by adequate findings based on substantial evidence of undue prejudice against interstate shippers and localities. *Florida* v. *United States*, — U.S. —, *supra*.

III. To remove the undue discrimination against interstate shippers and commerce, the Commission required the intrastate rates to be raised to the level which, in the exercise of its administrative judgment, it found were the proper rates to remove the discrimination. The Commission affirmatively found the interstate rates from the four districts nearest the Ohio districts and most nearly comparable therewith geographically and from the standpoint of distance and other transportation conditions, to be reasonable rates. The formal complaints filed by the interstate shippers in the Pittsburgh, Freeport, Connellsville, and Fairmont districts alleged undue prejudice because of the reduced Ohio rates and they also alleged that their

interstate rates were unreasonable. They submitted substantial evidence bearing upon these issues. The carriers, denying unreasonableness, submitted substantial evidence on that issue and also voluminous additional evidence to establish that the former Ohio rates were fairly aligned with the interstate rates in the same general territory. Upon this mass of evidence the Commission made its affirmative finding that these interstate rates were reasonable and, to remove the undue prejudice and discrimination growing out of the disparity between these reasonable interstate rates and the intrastate rates, required the increase of the Ohio rates to their former levels, restoring rates, relationships and differentials that had been in effect for many years, under which the industry had been fostered and under which the traffic moved freely both in interstate and intrastate commerce. The contention that the Commission should also have found the reasonableness of the interstate rates from the more southern fields is without substantial merit. It was enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville, and Fairmont district and the coal operators of those districts be found. There was no obligation upon the Commission to find specifically that each individual rate was reasonable or that rates from all localities were reasonable. *United States* v. *Louisiana,* 290 U.S. 70. The Commission's findings fully complied with the requirement of *Geor-*

gia Commission v. *United States*, 283 U.S. 765, 770, holding that the Commission must determine whether the existing interstate rates are reasonable as it may not require intrastate rates to be raised above a reasonable level. There was no allegation that the interstate rates from the more southern fields were unreasonable either because they were too high or too low. If it be contended that those rates are either unreasonably high or unreasonably low, and it is desired in good faith to test that question, the one contending is afforded a remedy by application to the Interstate Commerce Commission. "It may be that there cannot be an accommodation of all interests in one proceeding." *Interstate Com. Comm.* v. *Chi., R.I. & Pac. Ry.*, 218 U.S. 88, 108.

Appellants' argument that the rates from the southern Crescents are lower than those from the northern Crescents, based on ton-mile earnings, though in fact those rates are higher, and that consequently intrastate commerce is subjected to unjust discrimination, cannot be sustained unless it be shown, as a matter of law, that rates should increase in absolute proportion to the distance. But the law has been to the contrary from the beginning. Mere distance is not necessarily a controlling factor—indeed, the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road. *Louis. & Nash.*

R.R. v. *United States,* 238 U.S. 1, 12; *Interstate Com. Comm.* v. *Chi., R. I. & Pac. Ry.,* 218 U.S. 88, 107; *Interstate Com. Comm.* v. *Union Pacific R.R.,* 222 U.S. 541, 551. Further, it is an established principle of rate making that the rate per ton-mile should decrease as distance increases. *Southern Class Rate Investigation,* 100 I.C.C. 513, 642; *Business Men's League* v. *Ry. Co.,* 2 I.C.C. 52, 68–69. The rates from the southern Crescent fields to the destination territory here involved and to closely related territories have for years been made differentially over the southern Ohio districts. These differentials have twice been increased by the Commission, and key rates, upon which the entire relative adjustment in the territory involved has developed, have been fixed by the Commission. Therefore, the Commission's findings in this case, under the particular circumstances shown, were ample to support its order requiring restoration of recognized rates, relationships, and differentials, under which a huge coal traffic has heretofore freely moved, in order to remove the discrimination shown. Cf. *Georgia Comm.* v. *United States,* 283 U.S. 765, 774–775.

IV. The Commission granted a full and fair hearing to the State of Ohio, the Ohio shippers and all other parties to the proceeding. There is no contention that the Ohio shippers or the State authorities were denied permission to intervene in the proceeding, to submit the voluminous evidence, to

file printed briefs, to make oral argument before the Commission, and otherwise fully to participate in the proceeding. The contention that they were denied a full hearing is grounded on the assertion that the Commission predetermined the case. Their only basis for this assertion is the language used in the opening statement of the Commission's report. But that statement is obviously a mere description of the general nature of the case and of the important issues involved. The language has no other significance, and obviously no inference of predetermination may logically be drawn from it, since the language indicates that the only order contemplated was such as the facts and circumstances might warrant. Nor does the language in that part of the Commission's report under the heading "Summary" indicate either predetermination of the case or presumption against the legality of the Ohio rates. That language shows that it is the expression of some of the Commission's conclusions from the evidence, rather than a presumption. Of significance in this relation is the holding of the court below that there is substantial evidence to support the finding of discrimination against persons and localities, "if not, in fact, a demonstration of the correctness of that finding." Most of appellants' argument in this connection, though submitted as one alleging lack of full hearing, in reality is one directed to the weight of the evidence.

(a) The weight of the evidence was for the Commission. *Interstate Com. Comm.* v. *Louis. & Nash. R.R.*, 227 U.S. 88, 98; *Florida* v. *United States*, — U.S. —, No. 342, decided April 2, 1934. In relying upon the views expressed in the dissenting opinion of one Commissioner, counsel for appellants by implication invite the Court to substitute its judgment for the judgment of the majority of the Commission upon an administrative matter. The dissenting Commissioner disagreed with the majority not upon any question of the authority of the Commission to make the order or upon any other question of law, but solely in reference to the judgment or discretion to be exercised in reference to the administrative problem presented. *Interstate Com. Comm.* v. *D. L. & W. R.R.*, 220 U.S. 235; *Interstate Co. Comm.* v. *Union Pacific R.R.*, 222 U.S. 541, 550; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482.

ARGUMENT

I

The substantial rate reductions in the Ohio intrastate rates resulted in serious discrimination against interstate shippers, caused large decreases in the revenues of the carriers, and threatened further revenue reductions of such great magnitude as to constitute a real menace to the maintenance by the carriers concerned of adequate interstate railway service

As well said by the court below, the reductions in the Ohio intrastate rates "threw the entire rate

structure out of balance, operated to create a competitive advantage in behalf of the Ohio mines and operators, and, by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations by placing them at a competitive disadvantage." (R. 467.)

A few instances are sufficient to illustrate the general nature and extent of the discrimination. Prior to August 1, 1932, the rate from Ohio No. 8 to Cleveland was $1.74, while the rate from the Pittsburgh district was $1.84. The distance from Ohio No. 8 is 128 miles while that from the Pittsburgh district is 162 miles. Thus the rate from the Pittsburgh district was 10 cents a ton greater for a greater distance of 34 miles. The Ohio No. 8 rate was reduced August 1, 1932, by 29 cents to $1.45, so that it was then 39 cents less than from the Pittsburgh district. This resulted in a rate from the Pittsburgh district 39 cents greater for a greater distance of 34 miles. The intrastate rate from the Hocking district to Cleveland, 199 miles, was 15 cents higher than from Ohio No. 8. Prior to August 1, 1932, this rate was $1.89, and after the Ohio No. 8–Cleveland rate had been reduced 29 cents a ton, a like reduction was made in the Hocking-Cleveland rate, bringing it down to $1.60. The distance from the Hocking district to Cleveland is 199 miles. Thus the reduced rate from the Hocking district was 24 cents less than from the Pitts-

burgh district though the distance was 37 miles greater. From the Pomeroy district the disparity was still greater. Though the distance from the Pomeroy district to Cleveland is 252 miles, the same rate applies from that district as from the Hocking. That rate was also reduced from $1.89 to $1.60, resulting in a rate from the Pomeroy district 24 cents less than from the Pittsburgh district though the distance was 90 miles greater. The former rate from the Cambridge district to Cleveland (176.1 miles) was $1.74, as compared with the Pittsburgh district rate of $1.84 for a distance of 162 miles, or 14.1 miles shorter. The Cambridge rate was reduced by order of the Ohio Commission to $1.45, thus increasing the difference in the rates in favor of Cambridge from 10 to 39 cents per ton, despite the longer distance. The interstate rate from the Connellsville district to Cleveland, 216 miles, was and is $1.90. The distance from this district is only 17 miles greater than from the Hocking district whereas its rate was 30 cents a ton more. The discrimination was even greater in comparison with the Pomeroy district, the reduced rate from that district to Cleveland of $1.60 applying for a distance of 252 miles while the interstate rate from the Connellsville district remained $1.90 for 216 miles. From the Fairmont district the interstate rate was and is $1.99 to Cleveland, distance 247 miles, as compared with the reduced rate of $1.60 from the Pomeroy dis-

trict, 252 miles, and $1.60 from the Hocking district, 199 miles. All the rates and distances above stated are taken from Appendix A to the Commission's report, R. 70–73, and that Appendix affords a basis for full comparison of the intrastate rates and distances with the interstate rates and distances. Upon consideration of all of them the Commission based its finding that the intrastate transportation was at rates generally substantially lower, distance considered, than the interstate rates.

The record shows that the reductions in the Ohio rates were so substantial that the interstate shippers were practically shut out of the market. There was testimony by numerous retail dealers at Cleveland and other northeastern Ohio destinations that after the reductions in the rates between Ohio points they were unable to market coal from the Crescents because of the relatively higher price. They explained that they could shrink their profits to meet the differences in rates that existed prior to August 1, 1932, but subsequent to that time the Ohio operators' rates were so much lower than those from the Crescents that it had been impossible to meet the Ohio competition. (R. 26.)

A witness for a coal operator in the Pittsburgh district testified in great detail regarding his lost business at Cleveland since the reduction in Ohio. Classifying his customers A, B, C, and D, he testified that class A customers consisted of dealers, 10

of whom discontinued buying coal upon the Ohio reductions; class B customers, numbering 15, being those who elected to make no new contracts but continued to buy on spot market basis, all were lost after the Ohio reductions, and the tonnage amounted to 646,900 tons annually; of the class C customers, being those who bought regularly from year to year but under no contract, 60 were lost and their tonnage amounted to 149,700 tons annually; of the class D customers, being those who bought from time to time, 39 were lost and their tonnage amounted to 123,800 tons annually. Most of these customers were retail dealers and all of this coal was for steam and domestic purposes. This witness testified that conditions would not change with respect to the marketing of Pittsburgh coal in Ohio until the rate situation was altered. (R. 26.)

Another witness, representing a coal producer in the Kanawha and Kenova-Thacker districts, also described his loss of business and difficulty in competing with Ohio mines after the reductions took effect. Similar testimony was given by many other coal operators who had previously shipped their coal to northeastern Ohio to a considerable extent. For example a witness representing a coal producer on the Monongahela Railway in the Fairmont district estimated that his loss of tonnage to northeastern Ohio would be about 300,000 tons annually because of the reductions made in the Ohio rates. (R. 26–27.)

"The record is replete with similar instances", the Commission said, "including testimony of a representative of the Public Service Commission of Pennsylvania that that State is losing its coal shipments to Ohio and southern fields and that the restoration of the former relationships in rates with the Ohio fields to northeastern Ohio is vital to the mining districts of Pennsylvania. Witnesses testified that since the reduction in the Ohio rates the tonnage from Ohio mines to Cleveland has increased." (R. 27.)

Later on in the report, in dealing specifically with the complaint of the Western Pennsylvania Coal Traffic Bureau, No. 25590, the Commission's report states:

> It has already been shown that one of the principal markets for these complainants' coal is in northeastern Ohio, and that since the reductions in Ohio the shipments from Pennsylvania have been greatly retarded. (R. 44.)

In dealing with the complaint of the receiver of the Continental Coal Company, No. 25656, an operator on the Monongahela Railway in the Fairmont district, the Commission found:

> Evidence of record shows that coal from points on the Monongahela is marketed at destinations in northeastern Ohio, including Cleveland and many other principal consuming points in that territory, in competition with coal from eastern Ohio districts

> as well as from Pittsburgh, Connellsville and other Crescent districts, and that since the reductions in the Ohio rates sales have been materially reduced and in some instances completely prevented. * * * Cleveland and Akron were the principal destinations to which these complainants made shipments, but since the reduction in Ohio they are precluded from shipping to any point in northeastern Ohio unless they assume large losses incident to absorption in their mine prices of the increased differentials now existing. (R. 51.)

Respecting the complaint of the Property Owners' Committee, No. 25657, operating mines in the Pocahontas, New River, Winding Gulf, Kanawha, Logan and Williamson (Kenova-Thacker) the report says:

> The Williamson field in the last year or so has lost 35 percent of its tonnage, 57 percent in northern Ohio generally, and 84 percent to the five destinations in northeastern Ohio to which the rates were reduced from eastern Ohio districts. Dealers in Ohio testified that formerly West Virginia coal was handled but Ohio coal has now been substituted because of the lower delivered price. Coal from points on the Norfolk & Western declined during the first ten months of 1932, 58.4 percent to Cleveland; 91.6 percent to Canton; 84.2 percent to Lorain; and 89.6 percent to Massillon. *This is virtual exclusion from these markets.* (R. 58–59.) (Italics our.)

Respecting the complaint of the receivers of the Consolidation Coal Company, (No. 25670) operating mines in the Fairmont district, the Commission said:

> In 1931, Ohio mines furnished the destination territory under consideration 3,161,000 tons, or 34.6 percent, and Fairmont; 1,058,366 tons or 11.6 percent. The immediate effect of the rate reduction in Ohio is shown by the following table of the percentages of total coal movement to the principal destinations in northeastern Ohio for the first seven months of 1932, combined, and for each of the remaining months after August 1, 1932, when the reductions took place: [Here follows the tabulation referred to showing a marked increase in the percentages from the Ohio districts after the Ohio reduction took effect and in contrast a marked reduction in the percentage from the Fairmont district. (R. 55.)]

This evidence and these findings, showing competition between the interstate and intrastate shippers, increase of the business of the intrastate shippers, and decrease in business, shrinkage of profits, losses, and other consequent injuries to the interstate shippers, is to be considered in the light of other findings of the Commission, especially the findings,

(a) that the movement of this coal from the Ohio points or groups to the Ohio territory in question "is at intrastate rates which are substantially

lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia"; (R. 63),

(b) that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other.[12] (R. 63.)

Upon this and other evidence as shown in and by the Commission's report, and other subordinate findings, the Commission made the ultimate finding—

> That the intrastate rates here in issue from eastern Ohio districts to the destinations in northeastern Ohio as defined in this report, are and for the future will be unduly

[12] Elaborate evidence of record disclosed in detail the transportation conditions from the Ohio mines and from the mines in Pennsylvania and West Virginia. See, for example, the testimony of witness Triem, superintendent freight transportation, Pennsylvania Railroad (R. 701–712); of witness Hewes, Baltimore & Ohio R.R. (R. 713–724); of witness Heinisch, New York Central (R. 725–730). In its report (R. 35), the Commission said:

"Witnesses for petitioning respondents are in accord in their testimony that there are no *substantial* differences between the transportation conditions in eastern and northeastern Ohio and those prevailing from the Pittsburgh group or any of the other groups west of the mountains in the inner and outer crescent groups, to northeastern Ohio. A witness for the Pennsylvania Railroad testified that a mile of service one place is substantially the same as a mile of service in another place in this general territory." (Italics ours.)

> preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio. (R. 64.)

Having found this undue preference and prejudice it was the Commission's duty, under section 13 (4) of the Interstate Commerce Act, to prescribe the rate thereafter to be charged which in its judgment would remove such preference and prejudice.

Obviously this could have been accomplished by permitting the Ohio rates to remain as they were and making reductions in the interstate rates corresponding to those that had been made in the intrastate rates. Cf. *American Express Co.* v. *Caldwell,* 244 U.S. 617, 624. But the Commission gave consideration to the reasonableness of the interstate rates from the base group—the Pittsburgh district, as well as from the Freeport, Connellsville and Fairmont districts, the reasonableness of the interstate rates from these four districts to the northeastern Ohio destinations having been specifically put in issue by the four formal complaints, and the Commission found that these interstate rates were reasonable. (R. 64.)

Now if the order in question had been simply an alternative one under section 3 requiring the carriers to remove the discrimination without specifying the manner in which it should be re-

moved, the carriers would have been free under the above findings to increase the intrastate rates, under the authority of the *Shreveport* case (*Houston & Texas Ry.* v. *United States,* 234 U.S. 342). For it was there said:

> It is also clear that, in removing injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injuries to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes. (*Ibid.,* 355.)

In concluding that opinion, the Court said, "So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates [the State rates], as to remove the forbidden discrimination. But this result they are required to accomplish." (*Ibid.,* 360.)

The order at bar, having been made under the subsequently enacted section 13 which for the first

time vested the Commission with a direct power to remove any undue, unreasonable or unjust discrimination against interstate commerce (*Wisconsin R. R. Comm.* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, 586), gave the carriers no alternative, but, following the mandate of section 13, prescribed the specific rates to remove the discrimination. This was accomplished, not by requiring reductions in the reasonable interstate rates, but by requiring the intrastate rates to be raised to their former levels at which they were fairly aligned with the reasonable interstate rates.

In so determining the Commission gave consideration to other matters and made other findings.

If found that coal had moved freely under both the interstate rates then in effect and which had been in effect for a long time and the intrastate rates which had been in effect for a long time prior to the reductions therein on and after August 1, 1932. As to the interstate rates the Commission said:

> Appendix B [Record 74–75] clearly indicates that in normal times coal moves freely from the inner and outer crescent districts to northeastern Ohio in substantial volume, and indeed, under abnormal conditions a very substantial movement of coal from these origins moved to Cleveland and other destinations in the same territory prior to the reduction in the Ohio rates. The interstate rates assailed as unreasonable prior to the Ohio reductions, did not prevent a

> substantial movement of coal to these Ohio destinations greatly in competition with Ohio mines. (R. 62–63.)

As to the former intrastate rates it was found:

> The record fully establishes that coal has moved freely between Ohio points prior to the reduction in rates in northeastern Ohio. This is significant.[13] (R. 62.)

It also found—

> That the Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled. (R. 63–64.)

It gave consideration to the financial condition of the carriers, to the fact that in 1931 they had earned less than a fair return, and to the fact that

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[13] In *Ann Arbor R. Co.* v. *United States*, 281 U.S. 658, 666–667, the court said:

"In rate making under existing laws it has been recognized that conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness; and it also has been recognized that so far as it can be done with due regard for the interests affected rates should be such as will permit the commodities to which they relate to move freely in the channels of commerce."

Under the newly enacted Section 15a (Emergency Railroad Transportation Act, 1933, 48 Stat. 220) the Commission is directed, in the exercise of its power to prescribe just and reasonable rates, to give due consideration, among other factors, to the effect of rates on the movement of traffic.

in the first nine months of 1932 they had earned no return but were operating at large and alarming deficits under fixed charges, as hereinbefore shown.

The Commission further found that bituminous coal constitutes a large and important part of the traffic of the interstate railroads involved, the percentage of bituminous coal to all the freight traffic of such important systems as the Baltimore & Ohio, the New York Central, the Pennsylvania, and the Pittsburgh & Lake Erie ranging from 41 to 55 percent. (R. 27.)

It further took into consideration the substantial losses in revenue which the carriers would suffer if reductions were made in the interstate rates corresponding to those in the intrastate rates. It found—

> The reduction on the Pennsylvania would be $948,447 if based on 1929 tonnage, and $516,400 if based on 1931 tonnage. The estimated reduction in revenue for other lines based on 1931 tonnage is as follows: New York Central, $202,666; Pittsburgh & Lake Erie, including tonnage received by it from the Monongahela, the Montour, the Pittsburgh, Chartiers & Youghiogheny, and the Pittsburgh & West Virginia in Pennsylvania, $331,375; and Baltimore & Ohio, $215,000. The Norfolk & Western estimates a reduction in revenue of about $500,000 based on its 1929 tonnage. (R. 60.)

If a corresponding reduction were made in the interstate rates to all destinations in central terri-

tory, it would result, the Commission found, "in a loss of revenue based on 1931 tonnage of $3,434,745 for the Pennsylvania, $1,271,291 for the New York Central, and $1,938,044 for the Pittsburgh & Lake Erie." (R. 69.) The effect that a reduction in interstate rates on coal to Ohio would have on the revenues of other lines was not shown in specific amounts but the Commission said "there is a substantial volume of coal destined to Ohio which is originated on or carried by the Pocahontas lines and by such lines as the Montour, and Monongahela, and the Pittsburgh & West Virginia, which derive the greater portion of their revenue from coal traffic." (R. 61.)

"Far greater losses", the Commission found, "would result if the reductions were reflected to related territories" (R. 61) and this greater estimated loss on account of maintaining the existing relationship of rates was stated in the report as follows:

> If the present Ohio intrastate reductions and the Pittsburgh & West Virginia interstate reduction continued and spread to other interstate fields, herein affected, the estimated revenue losses to the carriers would be $44,108,248.61 and $29,649,265.34 based on the 1929 and 1931 tonnages, respectively.[14] (R. 27–28.)

[14] These figures are based upon Exhibit 66 (Vol. II of Exs., page 147) showing the total movement of coal for the years 1929 and 1931 from all Ohio and all Crescent districts into and through Central Freight Association territory, it being

The Commission spoke of the "closely woven relationships of these rates" (R. 63) and said:

> Any change in the rates from these origin groups would disturb the adjustment involved in this proceeding. While the rates only to northeastern Ohio are assailed, yet any finding as to that territory would reflect itself immediately to the territory beyond, possibly altering the adjustment as far as Chicago. (R. 62.)

The manner in which the Ohio intrastate rates tumbled one after another following the first

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the territory west of Buffalo, Pittsburgh and Wheeling, north of the Ohio River and east of Chicago. This total movement in 1929 was 152,097,409 tons and in 1931, 102,238,846 tons. To these figures a reduction of 29 cents per net ton is applied, which is that made in the Ohio No. 8, Cambridge, Crooksville, Pomeroy and Hocking districts to Cleveland, resulting in the revenue losses shown in the report. It was testified that the total tonnages as here given are the most complete available, but they are several million tons shy of the full tonnage which might be affected if the Ohio intrastate reductions are carried to their logical conclusion, because a very large proportion of the coal shipped to Buffalo and to destinations east of Buffalo to and including Rochester, N.Y., is entirely omitted, although that rate adjustment is closely allied with the Central Freight Association structure. (R. 621.) It was further testified that due to the inter-relationships in the rates on coal from the entire Appalachian field into and through Central Freight Association territory, and to the commercial and competitive conditions existing throughout that territory, it is obvious that drastic changes, such as had been instituted by the Ohio Commission, could not be localized or confined to a small part of the territory, but must in the end extend the entire length and breadth of Central Freight Association territory and even beyond it. (R. 621–622.)

Ohio reductions amply demonstrates the soundness of the last-quoted assertion by the Commission.

The reductions in the Ohio rates threatened these enormous revenue losses in the face of serious losses already suffered because of the generally depressed economic conditions [15] and of the large deficits which the carriers were currently sustaining. Operating revenue and expense data submitted to the Commission "to demonstrate the need of carriers in the eastern district for additional revenue" showed that for the first nine months of 1932 (the latest period for which figures were available at the time of the hearing) there was a deficit of $25,720,000 *under fixed charges.* (R. 60.) Forty-three out of a total of 68 class I roads in the eastern district operated at a loss for this period. (R. 60.) The aggregate deficit of these 43 lines was $68,443,416 and the aggregate deficit of 8 roads affected by the reduced rates on coal was $29,598,000, or approximately 42 percent of the total. (R. 6.) The deficit of the Baltimore & Ohio for this nine-months' period was $5,837,202. (R. 60.) Only one line, the Pennsylvania, among those affected by the reduced rates on coal, had a surplus after payment of fixed charges, and this surplus was only slightly greater than the revenue accruing

[15] Cf. *Fifteen Per Cent Case, 1931*, 178 I.C.C. 539, 179 I.C.C. 215; *Increase in Intrastate Rates*, 186 I.C.C. 615; *United States* v. *Louisiana*, 290 U.S. 70.

to it under the emergency surcharges which had recently been authorized by the Commission for a temporary period in the *Fifteen Per Cent Case, 1931.* (R. 60; R. 693–701 and Exs. 85–89.)

In the *Fifteen Per Cent Case, 1931, supra,* the Commission, after a careful survey, found itself faced with an acute emergency calling for prompt action to give temporary financial relief to the transportation system. It adopted a plan under which small surcharges were to be added to rates on particular commodities that could bear them, which plan it estimated would "produce between one hundred million and one hundred twenty five million dollars' increased revenue on the basis of present traffic, if applied both state and interstate." Cf. *United States* v. *Louisiana,* 290 U.S. 70, 77, 80. By the surcharges authorized in the interstate rates, and later required in the intrastate rates in several states where the State Commission refused to authorize them, the Commission sought to carry out the broad purpose of section 15a of the Act to maintain an efficient transportation system by enabling the carriers to earn a fair return. *Ibid.,* 75. The reductions in the Ohio bituminous coal rates threatened revenue losses to the particular carriers concerned that would have offset a very substantial part, possibly a fourth or more, of the entire additional revenue expected to be realized from the country-wide application of the surcharges, the evidence having shown, as the Commis-

sion found, that if the Ohio intrastate reductions continued and spread to other interstate fields the estimated revenue losses to the carriers would range from about twenty-nine and a half millions to about forty-four millions, dependent on whether the tonnage were equivalent to that in 1929 or 1931, respectively. These threatened revenue reductions were of such great magnitude as to constitute a real menace to the maintenance by the carriers concerned of adequate transportation service.

At the time the order here under review was entered Section 15a as originally enacted in Transportation Act, 1920, was in force. That section, in conjunction with other provisions of the Act, "imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R.*, 257 U.S. 563; *United States* v. *Louisiana*, 290 U.S. 70.

Since then Emergency Railroad Transportation Act, 1933, has been enacted amending that section. The Commission's duty is not different under the amendments. Under the new section the Commission is to consider, among other factors, "the effect of the rates on the movement of traffic"; "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service"; and "the need of revenues sufficient to enable the car-

riers, under honest, economical, and efficient management, to provide such service." In *Florida* v. *United States,* No. 342, decided April 2, 1934, Mr. Chief Justice Hughes, speaking for the Court said of the new section:

> Neither the elimination of the group method of rate making, nor the substituted rule, suggests an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce. On the contrary, the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues. The Congress had provided authority to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce. The Commission had exercised that authority. The Commission had not proposed the diminution of that authority. The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that the new rule of rate making left the power of the Commission under Section 13 (4) intact.

II

The order under consideration, requiring increases in the intrastate rates in order to remove (a) undue prejudice against interstate shippers and localities, and (b) unjust discrimination against interstate commerce from the revenue standpoint, is supported by adequate findings as to both types of prejudice or discrimination

In view of recent decisions of this Court, especially *Florida* v. *United States,* 282 U.S. 194; *United States* v. *Louisiana,* 290 U.S. 70, and the second decision in the *Florida* Case, *Florida* v. *United States,* — U.S. —, No. 342, decided April 2, 1934, it is no longer open to dispute that under the authority conferred by section 13 (4) of the Interstate Commerce Act, the Commission may make an order as to intrastate rates for the purpose of removing either undue prejudice against interstate shippers and localities or unjust discrimination against interstate commerce because of a revenue burden. In the first *Florida* Case, 282 U.S. at page 211, Mr. Chief Justice Hughes said that in the exercise of its power to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce, "the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a state-wide level of intrastate rates when this is found to be necessary to accomplish the pur-

pose of the statute." In the second *Florida* Case, Mr. Chief Justice Hughes further said:

> In *Railroad Commission of Wisconsin* v. *Chicago Burlington & Quincy R.R. Co.*, 257 U.S. 563, 585–587, we reached the conclusion that the provision of Section 13 (4) for the removal of "any undue, unreasonable, or unjust discrimination against interstate commerce" was not to be regarded as referring only to discrimination as between persons and localities. We held that Transportation Act, 1920, imposed an affirmative duty on the Commission "to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." Intrastate rates, we said, must play a most important part in maintaining such an adequate system. If there was interference with the achievement of that purpose because of a disparity of intrastate rates as compared with interstate rates, the Commission was authorized to end that disparity. It was to be ended because it constituted an "unjust discrimination against interstate commerce." We concluded that these words in Section 13 (4) were not tautological, but had the necessary effect of conferring authority upon the Commission to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transporta-

tion service, both interstate and intrastate. *United States* v. *Louisiana*, 290 U.S. 70, 75.

In the present case the Commission found the existence of both kinds of prejudice or discrimination forbidden by section 13, that is, it found that there was undue preference of intrastate shippers and localities with corresponding undue prejudice against interstate shippers and localities, and also that there was unjust discrimination against interstate commerce viewed from a revenue standpoint. But either of these types of discrimination or prejudice, standing alone, would have been sufficient to support the Commission's order.

It will be noted that this order is not State-wide in scope. For it does not require increases in intrastate rates throughout the State of Ohio but only in the rates on bituminous coal from the mining districts in eastern Ohio to certain destinations in the northeastern part of the State. It is not like the order involved in *Wis. R.R. Comm.* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, requiring increases in intrastate rates throughout the State, based upon findings of undue prejudice against persons and localities only at certain border points, which was susfainable in its State-wide sweep only as one necessary to remove an undue revenue burden upon the interstate carriers. Nor is it like that involved in the very recent Florida log case, *Florida* v. *United States, supra*, decided April 2, 1934, where no prejudice against

persons or localities was found and the sole purpose of the order was to remove an undue revenue burden. It is somewhat similar to *Georgia Comm.* v. *United States,* 283 U.S. 765, in which undue prejudice against persons and localities was found at each point in the destination territory involved, which was the State of Georgia. Here, the destination territory is northeastern Ohio and the particular points of destination are those to which the intrastate rates from Ohio mining districts were reduced on and after August 1, 1932.

The evidence in the case at bar clearly showed discrimination at each and every one of those destinations, growing out of the fact that the intrastate rates from the Ohio mining districts to those destinations, as so reduced, were lower than the interstate rates to the same destinations from mining districts in other States; and the Commission so found. (R. 64.)

As said by the court below, "The Commission not only found that the Ohio intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers of bituminous coal, but also that the assailed rates 'result and will result in undue, unreasonable, and unjust discrimination against interstate commerce in violation of section 13 of the act,' in that the 'Ohio intrastate traffic under those assailed rates is not contributing its just proportion to the revenues of the carriers and by reason of that

fact respondents are suffering substantial losses in their revenues to which they are justly entitled.' Thus the decision of the case was placed by the Commission both upon the ground that the intrastate rates in question caused unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand, and upon the ground that such rates caused undue and unreasonable discrimination against interstate commerce, as such. Both types of discrimination are forbidden by Section 13." (R. 467–468.)

But because it entertained doubt, in view of the first decision of this Court in the Florida log case, *Florida* v. *United States,* 282 U.S. 194, whether the Commission's findings here respecting the revenue losses were full enough or specific enough, it preferred to place its decision on the single ground of the existence, under the intrastate rates, of preference and prejudice as between persons and localities, stating it did "not believe that it is necessary to decide any other question, for the right of the Interstate Commerce Commission to remove such preference and prejudice, if it exists, is no longer open to dispute. [Citing *Louisiana Comm.* v. *T. & N. O. R. Co.,* 284 U.S. 125, 131; *Florida* v. *United States,* 282 U.S. 194, 210.]" And the court held it could not be disputed, upon the record, "that there is substantial evidence to support the finding of discrimination against persons and localities, if

not, in fact, a demonstration of the correctness of that finding." (R. 470.)

It would seem there could be no reasonable dispute as to the adequacy of the Commission's findings of preference and prejudice as between persons and localities. These findings have been summarized and quoted above. They are the same in substance as those made and found adequate in many cases of this character including *Commission v. Texas & N. O. R. Co.*, 284 U.S. 125. As stated on page 32 of the opposing brief, the Court there described the Commission's findings, which it held adequate, as follows:

> In the course of the Commission's report it is said that the disparity between the two scales is bound to operate as a real discrimination against, and obstruction to, interstate commerce, and result in interstate shippers being unduly prejudiced and interstate commerce unjustly burdened. And in its ultimate findings the Commission states that the intrastate rates to the extent that they are lower, *distance considered,* than corresponding interstate rates would result in undue preference and advantage to shippers and receivers of freight in intrastate commerce within western Louisiana and in undue prejudice to shippers and receivers of freight in interstate commerce between points in Arkansas, Oklahoma and Texas and points in western Louisiana, * * *. (Italics ours.)

Compare *Shreveport* case (*Houston & Texas Ry.* v. *United States*) 234 U.S. 342, 347; *American Express Co.* v. *Caldwell,* 244 U.S. 617, 619; *Georgia Comm.* v. *United States,* 283 U.S. 765, 769–769; *Alabama* v. *United States,* 283 U.S. 776.

If the findings as to undue preference and prejudice as between persons and localities are adequate and the order is otherwise valid viewed in the single aspect as one to remove such preference and prejudice, then it is unnecessary to consider the adequacy of the findings respecting revenue losses supporting the ultimate finding of unjust discrimination against interstate commerce from the revenue standpoint. It seems however that the order is also valid in this other aspect and that the findings are sufficient, though the Commission's report did not give all the figures shown in the record.

In addition to the specific finding that the intrastate rates in question "are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio" (R. 64), the Commission also found that the "Ohio intrastate rates result and will result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the Act." (R. 64.) Subordinate findings

in support of this latter finding were also made. It was found—

> That the Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenue of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled. (R. 63–64.)

It was also found in respect of the B. & O. alone that—

> The reduced intrastate rates based on its intrastate coal tonnage to the principal consuming points in Ohio in 1931, would result in a reduction of $226,000 in the revenues of this line. (R. 60, 659.)

We think that this finding as to the revenue losses of this one railroad is sufficiently illustrative of the losses that the other carriers would likewise suffer as the result of the reduced intrastate rates. Appendix B of the Commission's report (R. 74–75) shows the volume of bituminous coal transported from various Ohio, Pennsylvania and West Virginia districts to Cleveland and other important destinations in northeastern Ohio for each of the years 1922 to 1931 and the first six months of 1932. It was obvious that if a similar volume of coal moved from the Ohio districts to these destinations at reduced rates, there would be substantial revenue losses. Exhibit 64 (Vol. 2 of Exhibits, pages 142–143) shows the tonnage in 1929 from each of

the Ohio districts to Cleveland and other important northeastern Ohio destinations, the former and reduced rates applicable thereto and the revenue losses. For Cleveland alone the revenue losses are shown as $410,803.87. From all of the Ohio districts to all of the destinations shown the entire revenue losses are shown as $881,749.60. Witness Kern, who introduced this exhibit, testified that this exhibit "is a computation of the net losses to carriers by reason of the reduced rates brought about by orders of the Ohio Commission, which I have heretofore explained, applied to the 1929 movement of traffic. I have selected 1929 principally because it was the last year of general business prosperity. * * * This exhibit shows quite forcibly the extent to which carriers' revenues have been affected by the acts of the Ohio Commission. In the instance of the movement to Cleveland, it shows a reduction of more than $410,000, whereas the combined revenue losses are in excess of $881,000." (R. 619.) He further testified the revenue reductions shown are probably less than the actual effect of the reduced rates would be "because to the extent that the depressed rates on Ohio intrastate traffic have or will result in the displacement of tonnage hitherto shipped upon higher interstate rates, from districts situated outside the state of Ohio, it falls short of the actual revenue diminution. The fact, however, that the resulting figure is in excess of $881,000 is

to my mind sufficient to indicate the tragic effect which a continuance of these rates will have upon the carriers for whom I here speak. Exhibit No. 64 treats only of what has actually happened in Ohio, and if the carriers are to continue a competitive rate structure, such as has existed in the past and which I have described in great detail, these reductions cannot in the end be confined to origin districts in Ohio." (R. 619–620.)

The Commission did not however make a definite finding upon this evidence, possibly because it related only to the tonnage in 1929, a year of prosperity. There were other factors, too, which would have their effect upon the future volume of movement, such as the use of substitute fuels, and substituted modes of transportation, such as trucks and barge lines. See report, R. 62. In the recent decision in *Florida* v. *United States,* No. 342, decided April 2, 1934, not yet reported, Chief Justice Hughes said—

> The requirement of essential findings as to revenues did not demand an impracticable exactness. Losses through inadequate rates could be shown satisfactorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made.

In the present case the specific finding of revenue losses in the case of the B. & O. alone amounting to $226,000 in the revenues of that line based on one year's business, coupled with the more gen-

eral finding that the Ohio intrastate traffic was not contributing its just proportion to the revenues of the carriers, and by reason of that fact they were suffering *substantial* losses in their revenues to which they are justly entitled, is sufficient to support the order in question as one requiring removal of unjust discrimination against interstate commerce from a revenue standpoint, especially when the order is also supported by adequate findings based on substantial evidence of undue prejudice against interstate shippers and localities.

III

To remove the undue discrimination against interstate shippers and commerce, the Commission required the intrastate rates to be raised to the level which, in the exercise of its administrative judgment, it found were the proper rates to remove the discrimination

The Commission affirmatively found that the interstate rates from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio are reasonable rates:

> We find that the rates assailed from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio are reasonable, * * *. (R. 64.)[16]

[16] This finding was subject to an exception, not here important, relating to a minor issue in No. 25656, as to whether interstate rates from mines on the Monongahela Ry. should be accorded the Connellsville group rate instead of the Fairmont rate, which question was reserved for later consideration. R. 54, 55, 57.

The formal complaints filed by the interstate shippers, in addition to alleging that the relation between the reduced Ohio intrastate rates and the existing interstate rates subjected them to undue prejudice, also alleged that the interstate rates from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio were unreasonable. They submitted substantial evidence bearing upon the issue of the reasonableness of these rates. The carriers, denying that the rates were unreasonable, submitted voluminous evidence on the issue, and also much additional evidence of a similar character for the purpose of establishing that the former Ohio rates were fairly aligned with the interstate rates in the same general territory. Upon this mass of evidence the Commission made its affirmative finding that the interstate rates were reasonable.

Having found the reduced intrastate rates in Ohio to be substantially lower, distance considered, than these reasonable interstate rates, and having found the disparity as between them and the reasonable interstate rates to be greater than warranted by the transportation conditions, and that the discrimination was undue, it then became the Commission's duty under section 13 (4) to prescribe the rates which, in its judgment, would remove the discrimination. It found (R. '64):

> Such undue preference and prejudice and unjust discrimination should be removed by the establishment and maintenance of intrastate rates from the points or groups and to the destination territory from and to which the assailed intrastate rates apply which are no lower than the specific rates or rates on the basis set forth in Appendix D.

Appendix D (R. 76–77) requires the restoration of the intrastate rates from and to the points or groups named that were in effect immediately prior to August 1, 1932. These are shown in Appendix A (R. 70–73).

Appellants contend that the findings as to the reasonableness of the interstate rates are insufficient because the Commission failed to make a finding of reasonableness of the interstate rates from the more southern fields. But, having found the interstate rates from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to be reasonable, and having found undue prejudice and unjust discrimination to be caused by the unwarranted disparity as between these reasonable interstate rates, on the one hand, and the intrastate rates from the Ohio mining districts, on the other hand, the Commission could require the removal of this prejudice and discrimination without inquiring into the question whether discriminations existed with respect to the rates from other fields in the Appalachian region or whether such rates were reasonable.

For this reason appellant's contention was found by the court below to be without merit:

> The Commission also found that the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmont districts to destinations in northeastern Ohio were reasonable. It is contended that the order is void because the Commission did not also examine into and make findings upon all other rates from the Inner and Outer Crescents to northeastern Ohio. This contention is likewise without merit. It is enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville and Fairmont districts, and the coal operators of these districts, be found. There was no obligation upon the Commission to find specifically that each individual rate was reasonable, or that rates from all localities into northeastern Ohio were reasonable. Cf. *United States* v. *Louisiana,* [290 U.S. 70] supra (decided Nov. 6, 1933). If it be contended that any rate from some other locality is unreasonable, and it is desired in good faith to test this question, the one so contending is afforded a remedy by application to the Interstate Commerce Commission. (R. 470.)

It appears, therefore, that the findings fully complied with the requirement of *Georgia Comm.* v. *United States,* 283 U.S. 765, 770:

> It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate

against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. *State Corporation Comm.* v. *Aberdeen & Rockfish R. Co.*, 136 I.C.C. 173, 180.

As said by the court below, "the Commission had the power to prescribe intrastate rates in place of those found unduly to discriminate against persons and localities, and when it ordered the resumption of the rates in force prior to August 1, 1932, it necessarily placed its stamp of approval upon those rates as, upon the whole, reasonable." (R. 471.)

Appellants, relying upon the decision of the Commission in *State Corp. Comm.* v. *Aberdeen & Rockfish R. Co.*, 136 I.C.C. 173, say it holds that as a condition precedent to the removal of undue prejudice against interstate shippers from particular groups, growing out of an unwarranted disparity as between the interstate rates from those groups, and comparable intrastate rates, the Commission must inquire into and make findings as to the reasonableness of the intertsate rates not only from the particular groups in issue but from all other groups in the same or adjoining territories. The case does not so hold. In that case the "complainants withdrew their allegation of unreasonableness under section 1, so far as the interstate rates assailed"

were concerned (*ibid.*, 180) and by reason of the withdrawal of that allegation, no evidence was presented with respect to the level of the rates. (*Ibid.*, 181.) It is thus clear that in that Commission proceeding the trouble was lack of evidence with respect to the level, i.e., the reasonableness of the interstate rates in issue. That trouble does not exist in the case at bar, for, as above shown, there were allegations of unreasonableness under section 1 of the interstate rates from the Pittsburgh, Freeport, Connellsville, and Fairmont districts and substantial and voluminous evidence from which the Commission could and did make findings as to the reasonableness of the interstate rates from those districts. There was no allegation of unreasonableness of the interstate rates from the more southern fields. If the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmont districts to the northeastern Ohio destinations are reasonable, and if the relation of those reasonable interstate rates to the intrastate rates from the Ohio districts to the same destinations results in undue preference of the Ohio shippers and undue prejudice against the interstate shippers and unjust discrimination against interstate commerce, and if, in the judgment of the Commission, the proper intrastate rates to remove that preference, prejudice and discrimination are those in effect prior to August 1, 1932, as the Commission found and ordered, then the Commission's order is valid aside from questions aris-

ing in respect of the interstate rates from other fields.

There is nothing to the contrary in *State Corporation Com.* v. *A. & R.R. Co., supra.* There the complaint attacked certain distance rates which applied alternatively with certain group rates, without challenging the group rate adjustment of which the distance rates were an integral part. The Commission held that the distance rates could not be considered alone and that inasmuch as they were intended only for alternative application with the group rates, applying only when they were lower than the group rates, it was necessary also to consider the latter.

The decision in that case does not mean that in a situation like the one here involved, where there are numerous groups in a very large coal-producing area, embracing the whole Appalachian region, no relief may be obtained from any rate shown to be discriminatory from any one of the coal fields in that area unless all the rates from all the numerous fields are investigated. If this were the rule, no shipper in any one of those numerous groups could obtain relief from a discriminatory intrastate rate unless he assumed the unreasonably heavy burden of proving, by competent evidence, the reasonableness of all the rates from all the groups. It is enough if he shows that the group rate from his own group is reasonable and then shows that there is a disparity as between that rate and the intra-

state rate. The Commission may then correct the discrimination if found to be undue. If there are other discriminations they may be alleged and proved in separate proceedings. As said in *Interstate Comm. Comm.* v. *Chi., R. I. & Pac. Ry.*, 218 U.S. 88, 108, "it may be that there cannot be an accommodation of all interests in one proceeding."

Appellants' assertion that the rates from the southern Crescents are lower than those from the Pittsburgh, Freeport, Connellsville or Fairmont districts is unsupported. For there is no finding by the Commission that such rates are lower; and counsel cite no authority holding or finding that they are. Actually, they are higher, the rates to Cleveland from the Pittsburgh, Freeport, Connellsville and Fairmont districts being $1.84, $1.84, $1.90, and $1.99, respectively, while the rate from the Inner Crescent districts, such as Kanawha, Kenova and Thacker, is $2.39, and from Outer Crescent districts, such as New River, Pocahontas and Tug River, is $2.64. (R. 71–73.) Nor is there any finding by the Commission that the rates from these various districts are averaged, as opposing counsel assert, and they cite no authority for that assertion. The rate adjustment, the Commission found, "is the result of carrier and commercial competition over a long period of years together with the demands of consumers for particular grades of coal, and in some instances decisions of this Commission." (R. 61.)

A showing that earnings per ton per mile are lower for longer distances than for shorter distances does not establish, as a matter of law, that the rates for the longer distances are unreasonably low. For such is a normal characteristic of many rate adjustments. As stated by the Commission, "It is a generally recognized principle of rate making that the rate per ton per mile should continually decrease as distance increases."[17] Such a test, standing alone, cannot prove reasonableness or unreasonableness of freight rates.[18] The contention

[17] *Southern Class Rate Investigation*, 100 I.C.C. 513, 642; and as there explained:

"The freight rate combines two factors of cost, (1) terminal cost and (2) line-haul cost. Since terminal cost remains constant, whatever the length of haul, it follows that even if line-haul cost increases uniformly, the *rate* per ton-mile, which combines the two factors of cost, will continually decrease with distance. This result will, of course, be much more marked in the shorter hauls.

* * * * *

"The evidence submitted, therefore, confirms the theory that the rate per ton-mile should decrease with distance and be relatively high for the shorter hauls. Eliminating terminal cost, the remaining revenue per ton-mile should theoretically, it seems, be nearly uniform for the first 75 miles and then begin to decrease sharply, the decrease becoming gradually less rapid and the curve becoming practically a straight line as the longer hauls are reached."

[18] As said by the Commission in an early case, *Business Men's League* v. *Ry. Co.*, 2 I.C.C. 52, 68–69:

"The rule that the rate per ton per mile must be less for the greater distance is one of the tests by which the rates can be carefully scanned in themselves. It is, however, like looking at them with a microscope. It ignores all other tests except that which it alone furnishes. It ignores all sur-

here submitted to the Court by opposing counsel was urged and overruled by the Commission in *Ohio-Michigan Coal Cases,* 80 I.C.C. 663, in which the Commission found that the coal rates from Ohio and the Crescents have always been based mainly on the group principle, and that while the revenue per ton-mile under the rate from the Ohio fields to Toledo was 10.3 mills for an average distance of 220 miles, as compared with the revenue per ton-mile of 7.49 mills under the rate from the Inner Crescent to Toledo for an average distance of 355 miles, yet "it is a well recognized principle of rate-making that ton-mile revenue should decrease with distance." (*Ibid.,* 685.) The Commission there increased the differentials of the Inner and Outer Crescents over southern Ohio from 40 to 50 cents and from 60 to 75 cents per ton, respectively, in order to give the southern Ohio districts the full advantage of their location with respect to the consuming territory. (*Ibid.,* 686.) But this action was based on grounds other than variations in the ton-mile earnings.

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rounding circumstances and conditions and every factor of every kind and description that enters into the making of the rate, no matter how compulsory or imperious that factor may be. It serves in itself a valuable purpose, not only as a close test of what a rate really is, but also as a basis in the cases to which it can be made to justly apply as a rule; but to determine the reasonableness and justness of a rate, all surrounding circumstances and conditions, and the factors which enter into the making of the rate, if there are any that are compulsory or imperious, must be considered as well as the rights of the shipper."

Thus opposing counsel's unsupported assertion that the southern rates are now lower, coupled with a showing of lower earnings per ton-mile, does not establish as a matter of law that they are too low, or that they are unreasonably low, or that the rates from the districts in the northern part of the Crescents are higher, or unreasonably high.

The contention that the Commission's order, by raising the intrastate rates to the highest level of any of the interstate rates from the several groups exposes intrastate commerce to unjust discrimination, falls for the same reason. Appendix A of the Commission's report (R. 70–73) shows the former Ohio intrastate rates, i.e., the rates in effect prior to August 1, 1932, and also those in effect on the date of the report, referred to there as the "present" rates, from each of the Ohio districts to Cleveland and the other important destinations in northeastern Ohio. The Commission's order requires the restoration in each instance of the *former* intrastate rate. The distance from each district (over the "short tariff route") to each destination is also shown. The appendix likewise shows the prevailing interstate rates, in which there has been no change, from the various districts in the Inner and Outer Crescents to the same destinations, and the distance. Taking Cleveland as a typical destination, the following table shows the reduced intrastate rate from each of the Ohio districts in question in effect at the time of the

report and order, the former intrastate rate required to be restored, the interstate rate from vaious districts, and the distance:

INTRASTATE

From	Distance	Reduced intrastate rate	Former rate
Ohio No. 8	128.2	$1.45	$1.74
Middle	92.6	1.22	1.54
Middle-Coshocton	104.0	1.22	1.54
Massillon	75.4	1.08	1.54
Cambridge	176.1	1.45	1.74
Crooksville	170.9	1.47	1.76
Hocking	199.3	1.60	1.89
Pomeroy	252.5	1.60	1.89

INTERSTATE

	Distance	Present
Pittsburgh	162.0	$1.84
Freeport	162.9	1.84
Connellsville	216.4	1.90
Fairmont	247.0	1.99
Kanawha	353.8	2.39
Kenova	340.6	2.39
Thacker	364.1	2.39
New River	409.3	2.64
Pocahontas	434.8	2.64
Tug River	410.1	2.64

It cannot be said that the prescribed intrastate rates, shown in the column headed "Former rate," are higher than the interstate rates unless it be shown, as a matter of law, that all these rates should increase in absolute proportion to the distance. But the Commission holds that "Distance has never been made the sole measure of these rates." (R. 62.) And "If such a measure were to govern the farther distant groups would be unable to compete"—in other words, the traffic would

not move. Nor have the intrastate rates been made solely in reference to distance. As pointed out by the Commission "Hocking district takes 15 cents over Ohio No. 8 to Cleveland for a greater distance of about 100 miles." (R. 58.) Pomeroy takes the same rate as Hocking to Cleveland and from the above table it will be noted that the distance from Pomeroy, 252.5 miles, is nearly twice the distance from Ohio No. 8, 128.2 miles, but that the rate from Pomeroy, $1.89, is not twice that from Ohio No. 8, $1.74, but only 15 cents higher.[19] The Commission further pointed out that "the Kanawha district to the same destination is now required to pay 79 cents over Hocking for a greater distance of about 100 miles. If distance were the rule of thumb to measure differentials it is apparent that either the 15-cent or 79-cent differential is unwarranted." (R. 58.) The Commission added—

> Mileage has always been disregarded to a very great extent in making coal rates from the Appalachian field. See also *Lake Cargo Coal Rates,* 46 I.C.C. 159, 188; *Ohio-Michigan Coal Cases, supra* [80 I.C.C., 685].

[19] In *Ohio-Michigan Coal Cases*, 80 I.C.C. 663, 685, the Commission said:

"In fact, the rates from coal-producing fields in Ohio are based upon the same group principle, and distance from the different producing points within Ohio is not there controlling. The range of distance between the nearest and farthest producing points in Ohio from which the same rates apply is as great in some instances as the range of distance between certain producing points in Ohio and points in the Inner Crescent."

The law does not require that rates shall be made according to distance alone. In *Louis. & Nash. R.R.* v. *United States*, 238 U.S. 1, 12, the Court said:

> Water competition, rail competition, and competition of markets, enter so largely into the establishment of rates that mere distance is not necessarily a controlling factor—indeed the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road.

In *Interstate Comm. Comm.* v. *Chi., R. I. & Pac. Ry.*, 218 U.S. 88, 107, the Court quoted the Commission to the effect that either the postage stamp theory of rate making or one based strictly upon mileage "would create revolution in transportation affairs and chaos in commercial affairs that have been builded upon the system of rate making now in effect." See also *Int. Comm. Comm.* v. *Union Pacific R.R.*, 222 U.S. 541, 551.

It is significant that no contention was advanced in the Commission proceeding by the appellants that the rates from the southern Crescent districts were too low. As shown by the Commission's report, the defense of the reduced Ohio rates was not that the former rates were too high in comparison with those from the southern Inner or Outer Crescents, or that the differentials of the Crescents over the Ohio districts were not great enough, but that the reduced Ohio rates were maximum reasonable

rates as compared with the rates prescribed by the Commission in Illinois and Indiana (R. 35–37), as compared with the so-called ex-river rates (R. 37–43), and in view of the Wheeling's cost study (R. 29–33). The Commission gave consideration to this evidence and accorded it the weight to which, in its judgment, it was entitled.

As shown in the report, the rates from the southern West Virginia and Kentucky fields in the Inner and Outer Crescents are constructed differentially over eastern or southern Ohio (R. 24, 58). At present the differential of the southern Inner crescent districts is 50 cents per ton over Hocking and of the southern Outer Crescent districts 75 cents per ton over Hocking. These differentials were fixed by the Commission in *Ohio-Michigan Coal Cases*, 80 I.C.C. 663, 686, in respect of traffic to so-called "affected territory", embracing northwestern Ohio, the southern peninsula of Michigan, and part of Indiana. (See Ex. 22, Vol. I of Exs., p. 143.) In the same case the Commission fixed the rate from southern Ohio group to Toledo—the key rate—at $1.89. Cleveland regularly takes the same rate as Toledo on coal from southern Ohio and from the southern Crescent districts and, accordingly, the $1.89 rate from southern Ohio was made to apply to Cleveland. (R. 24, 565, 566, 585, 599.)[1] The present rates from the Inner and

[1] The $1.89 rate remained in effect to Cleveland until reduced to $1.60 in the series of Ohio reductions. No corresponding reduction was made to Toledo because to reduce

Outer Crescents to Cleveland are made on this differential basis—$2.39 from the Inner Crescents, or 50 cents over the $1.89 rate from the southern Ohio fields of Hocking and Pomeroy, and $2.64 from the Outer Crescents, or 75 cents over the rate from the Hocking and Pomeroy fields.

As stated, these differentials were fixed by the Commission. In *Bituminous Coal to C.F.A. Territory,* 46 I.C.C. 66, 129, the Commission increased the differential in the rate from the southern Inner Crescent districts over southern Ohio from 25 cents to 40 cents. In *Ohio-Michigan Coal Cases, supra,* the Commission again increased this differential from 40 cents to its present level of 50 cents, upon a finding that the 40-cent differential was unduly prejudicial to southern Ohio districts and unduly preferential of the Inner Crescent districts to the extent that said differential was less than 50 cents per ton. The Commission further found that a differential between the southern Ohio and Inner Crescent districts more than 50 cents per net ton would be unduly prejudicial to the Inner Crescent districts and unduly preferential of the southern Ohio districts. (80 I.C.C., 686.) In the same case the Commission increased the Outer Crescent differential from 60 to 75 cents per ton upon the similar finding of undue preference and prejudice.

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that rate would violate the Commission's order in the *Ohio-Michigan Coal Cases, supra.* The order in the case at bar restores the $1.89 rate to Cleveland.

The increase in the differential as between southern Ohio and the Inner Crescent of 10 cents was brought about by a reduction of 10 cents in the rates from the southern Ohio districts, the Commission finding that no increase in the rates from the Inner Crescent would be justified. 80 I.C.C. 687. It did find, however, that an increase of 5 cents per ton in the rates from the Outer Crescent "*would result in rates no more than reasonable*" and "would offset to some extent the loss in revenue that would result from increasing the differential between the rates from the southern Ohio and Inner Crescent districts to affected territory by a reduction of 10 cents per ton in the interstate rates from southern Ohio." *Ibid.*, 687. The increase in the differential between southern Ohio and the Outer Crescents was effected by increasing the rate from the latter 5 cents per ton which, in conjunction with the 10-cent reduction from southern Ohio, resulted in the increase of 15 cents in the differential, that is, from 60 to 75 cents. *Ibid.*, 687. (See R. 599.)

Bituminous Coal to C.F.A. Territory, supra, was an elaborate investigation of coal rates from the Ohio and Inner and Outer Crescent districts. The Commission there found, p. 144, that the rates from Ohio mines to interior Michigan cities were not unreasonable. This finding, in substance, was that the rate from Ohio and also from the Crescents to Toledo was a reasonable rate, for it was found

that the Ohio-Toledo rate was "the key rate of the great rate structure here under consideration" and that the Inner Crescent rates were built over the Ohio rates rather than that the Ohio rates were built under the Inner Crescent rates. (*Ibid.*, 82.) In the later *Ohio-Michigan Coal cases*, 80 I.C.C. 663, the Commission said that "by far the greater tonnage of coal to the consuming points is hauled through Toledo. As the Ohio districts are nearer to the points of consumption, the rates therefrom exercise a strong influence upon the entire rate structure. For that reason the rate from the Hocking district in southern Ohio to Toledo, which may be considered as reflecting average conditions, has been regarded as the key rate that controls the measure of other rates from the producing districts to the affected territory" (*ibid.*, 668); and further the Commission said "There is nothing of record to indicate that the rates from Ohio have ceased to be the pillar upon which the entire rate structure rests." (*Ibid.*, 668.)

At the time of that report the Pittsburgh district rate to Cleveland was $1, which formed the basis for the then existing rate of $1 from southern Ohio districts to Toledo. In 1914, the Commission approved the then existing rate from the Pittsburgh district to Youngstown, finding it not unreasonable or unjustly discriminatory. *Youngstown Sheet & Tube Co.* v. *Pittsburgh & Lake Erie R.R. Co.*, 29 I.C.C. 428. Before and since that find-

ing, the rate from Ohio No. 8 to Youngstown has been the same as the rate from the Pitsburgh district to Youngstown; and the Pittsburgh-Youngstown rate has been regarded as the "key rate" in the adjustment to northeastern Ohio, on which the Pittsburgh district rates to that territory have been built. (R. 23–24.) Cf. *Five Per Cent Case*, 32 I.C.C. 325, 333. Subsequently, owing to war conditions, all freight rates in the United States were materially advanced, first during Federal control by the Director General of Railroads and later by the Commission in compliance with the direction in section 15a of Transportation Act, 1920. In 1922 a general reduction took place. See *Ex Parte 74, Increased Rates, 1920,* 58 I.C.C. 220; *Reduced Rates, 1922,* 68 I.C.C. 676. The $1.00 rate from southern Ohio to Toledo became $1.89, and, to maintain the existing parity, the same rate was made to apply to Cleveland. "Upon these rates", the Commission said in the present case, "the entire relative adjustment in this territory has developed." (R. 24.) The rate of 70 cents from the Pittsburgh district to Youngstown, 96.4 miles, approved by the Commission in 1914, after being subjected to the general increases and reductions, became $1.34. (R. 45.) Cleveland has uniformly taken a differential of 50 cents over the rate to Youngstown on coal from the Pittsburgh district. (R. 46.) This differential of 50 cents added to the Pittsburgh-Youngstown rate of $1.34 results in the rate of $1.84 from Pittsburgh to Cleveland.

Of the four groups—Pittsburgh, Freeport, Connellsville, and Fairmont—Pittsburgh is the *base* group. That is to say, the rate from the Pittsburgh group controls the rates from the other three, because of the differential relationship. There is a recognized and approved differential relationship as between the Pittsburgh district and the Ohio No. 8, the normal fixed differential of Ohio No. 8 being 10 cents under Pittsburgh to destinations such as Cleveland. This differential relationship was approved by the Commission, not only in the present case, but also in the *Ohio-Michigan Coal Cases*, 80 I.C.C. 663, 689, 690. In turn, there is a differential relationship between Ohio No. 8 and the southern Ohio fields of Hocking and Pomeroy, those fields taking a differential of 15 cents per ton over Ohio No. 8 (R. 24).

In view of the fact that the complainants in the southern Inner and Outer Crescent groups did not attack the interstate rates to the northeastern Ohio destinations as unreasonably high, that the Ohio operators did not challenge these rates as unreasonably low, and that these rates were controlled by closely related rates the reasonableness and interrelationship of which had been passed upon by the Commission in previous cases, it was not essential that the Commission explicitly pass upon these rates in the present case.

Its affirmative finding in this case that the interstate rates from the Pittsburgh, Freeport, Con-

nellsville, and Fairmont districts are reasonable, in view of the recognized interrelationships of the rates in question, as approved by it repeatedly in previous cases, and in view of all the other facts and circumstances shown, was an adequate and sufficient finding upon this phase of the case.

What the Commission did was this: It required the restoration of the rates and relationships that had been in effect for many years, under which the industry had been fostered (R. 63) and under which the traffic moved freely in both interstate and intrastate commerce (R. 62, 63), and which the Commission found, upon an exceptionally full record, were the proper rates to remove the undue prejudice and discrimination against interstate shippers and commerce.

Many of appellants' contentions appear to us to be answered by the following quotation from the Court's opinion in the *Georgia* case, *supra* (283 U.S.) at pages 774–775:

> Appellants contend that the order was an arbitrary exercise of the Commission's limited power over intrastate rates and that it constitutes an invasion of the sovereign rights of the State. It is urged, among other things, that while the findings require intrastate rates no lower, distance considered, than those contemporaneously applicable on interstate traffic, the Commission had theretofore consistently held that distance is not the sole controlling factor in rates; and

also that the Commission's allowance of higher rates for joint-line hauls is inconsistent with uniform scales established by it in other decisions. The argument is, in effect, an appeal to this Court to review the exercise of administrative discretion. It is not our province to enquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusion with those reached in similar cases. *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271. The facts to which our attention is called furnish no support for the charge of arbitrariness or of invasion of the sovereign rights of the State. Compare *Shreveport Case*, 234 U.S. 342, 354; *American Express Co.* v. *Caldwell*, 244 U.S. 617, 625.

IV

The Commission granted a full and fair hearing to the State of Ohio, the Ohio shippers, and all other parties to the proceeding

Not denying that the Ohio shippers and the State authorities were permitted to intervene in the proceeding, to submit voluminous evidence, to file printed briefs, to make oral argument before the Commission, and otherwise fully to participate in the proceeding, counsel for appellants yet contend that they were denied a full hearing, on the alleged ground that the Commission predetermined the case. Counsel say this predetermination is ad-

mitted by the opening statement in the Commission's report, which reads as follows:

> Upon petition of the principal railroads operating within the State of Ohio, alleging a violation of section 13 of the Interstate Commerce Act, we entered upon an investigation concerning the lawfulness of all rates and charges for the intrastate transportation of bituminous coal, in carloads, from eastern Ohio mines to destinations in northeastern Ohio from and to which the Public Utilities Commission of Ohio fixed or authorized rates by orders in its dockets shown in the margin, and all rates and charges on like traffic permitted by the Ohio Commission to be established from and to the points also named in the margin, and also from the said Ohio mines to points intermediate to the destinations in Ohio to which the rates were required to be reduced under the long-and-short-haul provision of the law administered by the Ohio Commission, with a view to prescribing such nondiscriminatory, nonprejudicial, and otherwise lawful rates and charges for such traffic as the facts and circumstances may warrant. Petitioners ask for a finding that the rates required, authorized, or permitted to be established by the Ohio Commission are unlawful, and cause an undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce on the other hand, and an undue, unreasonable, and

> unjust discrimination against interstate commerce. An order requiring removal of the advantage, preference, prejudice, and discrimination is sought. (R. 19–20.)

This is obviously a mere description of the general nature of the case and of the important issues involved. The language has no other significance, and obviously no inference of predetermination may logically be drawn from it, especially since the language indicates that the only order contemplated was such as the facts and circumstances might warrant.

Appellants further say (brief 22) that the Commission, "driven by the necessity of supporting its predetermination to raise the Ohio rates, and conscious of the weakness of the evidence upon which it had to act, devised a presumption against the legality of the Ohio rates of an unparalleled severity." They assert this presumption is found in the language used in the Commission's summary in the report, part of which is quoted in their brief. Reference to that language (R. 61–63) shows, however, that it is the expression of the Commission's conclusions from the evidence, rather than a presumption. The court below, upon mature deliberation and full examination of the record, said it did not think "it can be disputed, upon the present record, that there is substantial evidence to support the finding of discrimination against persons and localities, if not, in fact, a demonstration of

the correctness of that finding." (R. 470.) The court further said:

> Here, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers in Pennsylvania and West Virginia. * * * as we have said, this was practically the only conclusion at which the Commission could have arrived. (R. 470.)

The remainder of the argument in the first section of appellants' brief, though submitted as one alleging lack of full hearing, is in reality one directed to the weight of the evidence.

(a) The weight of the evidence was for the Commission

Appellants refer to three lines of evidence, "first, the Indiana-Illinois comparisons; second, the Wheeling's cost study; third, the eastern comparisons." (Appellants' brief, page 20.)

1. In defense of the reduced Ohio intrastate rates, appellants introduced, for comparative purposes, evidence showing the rates prescribed by the Commission in Indiana and Illinois in *Intrastate Rates on Bituminous Coal in Illinois,* 182 I.C.C. 537, and *Coal Trade Asso. of Indiana* v. *Baltimore & O. R. Co.*, 185 I.C.C. 225; 190 I.C.C. 743. The Commission discussed this evidence at some length in its report (R. 35–37), and concluded that "The conditions that led us to establish the basis of rates

in the Indiana-Illinois territory are not present in northeastern Ohio." (R. 36.) These comparisons had probative value and were properly receivable in evidence, and "after allowing for dissimilarities in conditions, might be used along with all the other evidence in order to test the reasonableness" of the rates in question. *Louis. & Nash. R.R.* v. *United States,* 238 U.S. 1, 16. But they were not conclusive, and the weight to be accorded them was for the Commission. Respecting the determination, by comparison, of the reasonableness of freight charges, the Court in *Louis. & Nash. R.R. v. United States, supra,* page 12, said:

> Until some standard is adopted they may prove nothing—even where the two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably high, or too low because compelled by conditions over which the carrier had no control. Water competition, rail competition, and competition of markets, enter so largely into the establishment of rates that mere distance is not necessarily a determining factor—indeed the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road.

In *Int. Comm. Comm.* v. *Louis. & Nash. R. R.*, 227 U.S. 88, 98, speaking through Mr. Justice Lamar, the Court said:

> The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies accordingly to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies, and history of rate-making in each section of the country.

In many other cases the Court has held that the weight of the evidence is for the Commission. The rule is not different in a case involving intrastate rates. Mr. Chief Justice Hughes in the latest section 13 case decided by the Court, *Florida* v. *United States*, No. 342, decided April 2, 1934, said:

> The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by Section 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That author-

ity rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *The Shreveport Case*, 234 U.S. 342, 351, 354, 355; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R.R. Co., supra.* The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States* v. *Louisville & Nashville R.R. Co.*, 235 U.S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. *Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88, 100; *Western Chemical Company* v. *United States*, 271 U.S. 268, 271; *Virginian Railway Company* v. *United*

States, 272 U.S. 658, 663; *Assigned Car Cases*, 274 U.S. 564, 580; *Merchants Warehouse Company* v. *United States*, 283 U.S. 501, 508; *Crowell* v. *Benson*, 285 U.S. 22, 50, 51.

Appellants repeatedly refer to and quote from the dissenting opinion of Mr. Commissioner Eastman. But his disagreement with the majority was in respect primarily of administrative judgment and secondarily on the weight to be given to the evidence. This is shown by the summary of his opinion in which he stated:

> Summing up the matter, my judgment is that the majority have given altogether insufficient weight to the evidence which is favorable to the Ohio rates and have accorded too much weight to the opposing evidence. (R. 69.)

In relying upon the views expressed in the dissenting opinion, counsel for appellants by implication invite the court to substitute its judgment for the judgment of the majority of the Commission upon an administrative matter. In effect they ask the court to sustain the views of the dissenting Commissioner and to reject the views of the majority upon the administrative question. But, as stated above, the dissenting Commissioner disagreed with the majority not upon any question of the authority of the Commission to make the order or upon any other question of law, but solely in reference to the judgment or discretion to be exer-

cised in reference to the administrative problem presented.

Mr. Chief Justice White in *Int. Comm. Comm.* v. *Del., L. & W. R.R.*, 220 U.S. 235, pointed out that the court below, in granting a preliminary injunction against the enforcement of the Commission's order there involved, rendered no opinion other than the statement that a majority of the court were in accord with the reasoning and conclusions expressed in the dissenting opinion of the Chairman of the Commission, and that they did not think it necessary to add anything to his exhaustive discussion of the questions presented. This, the court held, was error, stating:

> As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. * * * We say the contentions all reduce themselves to this, because in their final analysis all the other differences, insofar as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. *Baltimore & Ohio R.R.* v. *Pitcairn*, 215 U.S. 481. This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the rea-

> sons given by the dissenting members, except insofar as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission.

Cf. *Int. Comm. Comm.* v. *Union Pacific R.R.*, 222 U.S. 541, 550; *Mfrs. Ry. Co.* v. *United States*, 246 U.S. 457, 482.

2. The Wheeling & Lake Erie, who, following the first reductions ordered by the Ohio Commission, voluntarily reduced its bituminous coal rates in Ohio, contending that the reduced rates were maximum reasonable rates, introduced a cost study in an attempt to show its cost of transporting bituminous coal in Ohio. The Commission reviewed this evidence in its report, R. 29–33, and concluded "that the estimated transportation costs do not represent an accurate and reliable measure of the probable actual costs." (R. 33.) On this account, the Commission said:

> The results of the study cannot be used as the sole guide to what the maximum reasonable rate should be for the transportation services here involved. (R. 33.)

It is clear from the Commission's report that this evidence was considered and given the weight to which in the Commission's judgment it was entitled.

3. Appellants criticise so-called "eastern comparisons." There were many comparisons of the former rates in Ohio, that is, the intrastate rates in effect prior to August 1, 1932, with various interstate rates, some but not all of which were to eastern destinations. Many of these rates had been prescribed by the Commission and evidence showing them was introduced by the petitioning respondents in the Commission proceeding in support of their contention that the former Ohio intrastate rates, which they sought to have restored were fairly aligned with the level of interstate rates between representative points. Among the rates referred to were those from the Pittsburgh district to Ashtabula, Ohio, 162.2 miles, $1.84; to Canton, 143.4 miles, $1.59; to Warren, Pa., 218.2 miles, $2.09; and to Youngstown, 96.4 miles, $1.34. Also shown were rates to Warren from the Reynoldsville district, 84.5 miles, $1.50; from the Fairmount district, 115.7 miles, $1.70; and from the Aladdin district, 123.4 miles, $1.80. (R. 28.)

Petitioning carriers contended that the foregoing list of rates and many others, either prescribed or approved by the Commission for application in this territory, are on a reasonable basis and correspond with many others in the same territory. They also showed numerous other rates and in instances where these rates had been prescribed by the Commission they cited the Commission report.

A number of these are listed in the Commission's report (R. 28–29), followed by the statement:

> The record is replete with comparisons of this nature to indicate that the former rates in Ohio were not higher than rates in the same general territory and that the reduced rates are on a lower basis than prevail on interstate shipments of bituminous coal from the Appalachian district. (R. 29.)

But in finding that the interstate rates were reasonable, and that consequently the reduced Ohio rates were unreasonably low, the Commission did not rely upon these rate comparisons alone. In addition there was a large amount of evidence showing the transportation conditions under which the particular traffic in question moved. There was evidence of the distances (See Appendix A, Commission's Report, R. 70–73), of the volume of the movement (See Appendix B of Commission's Report, R. 74–75), of the cost and value of the service, of the histories of the rates, of the revenues, of the financial condition of the carriers, of carrier competition both railroad and water, of producer and market competition, and much else as shown by the Commission's report. In addition there was the fact that the rate structure which was found by the Commission in this case to be reasonable and nondiscriminatory, was largely built upon rates previously approved or prescribed by the Commission. (See Record 23–24, 45–46.) Indeed, there was such a large mass of other evidence in the rec-

ord that the so-called "eastern comparisons" could be eliminated and yet leave substantial evidence to support the findings.

CONCLUSION

It is respectfully submitted that the decrees of the court below dismissing the bills for want of equity should be affirmed.

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MAY, 1934.

APPENDIX

The Interstate Commerce Act, as amended by Transportation Act, 1920 (41 Stat. 456) provides:

SECTION 1 (5):

> All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *

SECTION 3 (1):

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 13 (3):

> Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification,

regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

SECTION 13 (4):

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the

rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15a (2):

In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

By Emergency Railroad Transportation Act, 1933, Section 205 (c. 91, 48 Stat. 211, 220, approved

June 16, 1933), Section 15a (2) of the Interstate Commerce Act was amended to read as follows:

SECTION 15a (2):

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

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SUPREME COURT OF THE UNITED STATES.

Nos. 868 and 886.—October Term, 1933.

State of Ohio, et al., Appellants, 868 *vs.* The United States of America, et al. The United States of America, et al., Appellants, 886 *vs.* State of Ohio, et al.	Appeals from the District Court of the United States for the Southern District of Ohio.

[May 28, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

These are appeals from orders of a statutory court of three judges, convened in the Southern District of Ohio, in two suits, one brought by the State of Ohio and the Public Utilities Commission of Ohio, and the other by the Wheeling and Lake Erie Railway Company, against the United States and the Interstate Commerce Commission, to enjoin and set aside two orders of the Commission. The suits were consolidated for trial. The first of the Commission's orders, that of May 2, 1933, required the increase of Ohio intrastate rates on bituminous coal from certain mining districts in eastern and southern Ohio to destinations in the northeastern portion of the State. The second order, that of May 9, 1933, required the rates prescribed by the first to be increased by the amount of the surcharge authorized upon interstate rates on bituminous coal in the *Fifteen Per Cent Case*, 1931, 178 I. C. C. 539, 179 I. C. C. 215, and 191 I. C. C. 361. While the causes were under submission the period during which the surcharge was authorized expired, and it was discontinued. The court, therefore, refrained from any adjudication as to the order of May 9, 1933, and no issue is here raised concerning it.

The court granted preliminary injunctions, but after a hearing on the merits, dissolved them and dismissed the bills. It however, stayed the operation of the order of May 2, 1933, for a period of sixty days, so that the plaintiffs might perfect an appeal to

this court. Upon the allowance of an appeal (No. 868) the defendants took a cross appeal (No. 886) assigning as error the entry of the stay order. By decree of February 12, 1934 (291 U. S. —), the stay was vacated. The appeal in No. 886 will, therefore, be dismissed as moot.

The Commission's order of May 2, 1933, requiring the rates intrastate from points in southern and eastern Ohio to destinations in northeastern Ohio, on bituminous coal in carload lots, to conform to those in effect prior to June 30, 1932, was entered under Section 13 (3) and (4) of the Interstate Commerce Act.[1] The Commission found that the reduced rates put into effect on the intrastate traffic in question as a result of orders or permission of the Public Utilities Commission of Ohio were unduly preferential of persons and localities in Ohio, unduly prejudicial to persons and localities without the State, and that they cast an undue revenue burden upon interstate commerce.

The appellants, conceding the Commission's power under Section 13 (3) and (4) of the Act (*Florida* v. *United States*, 282 U. S. 194, 208; *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. —), claim the dismissal of the bills was erroneous for these reasons: (1) The Commission did not afford them the full and fair hearing to which they are entitled by Section 13 of the Act. (2) There is no evidence to support the finding that restoration of the State rates to their former level was required to avoid undue preference and prejudice between persons and localities. (3) The Commission exceeded its authority in requiring the State rates to be raised, without first having found reasonable, or made reasonable, all substantially competitive interstate rates to the same destinations.

The District Court held the order justified by reason of undue preference and prejudice, but did not pass upon the lawfulness of the Commission's action in respect of revenue discrimination. We hold the decision of the court was right and we need not discuss the arguments presented as to revenue burden.

The litigation does not involve state-wide rates, but only those on bituminous coal in carloads from producing fields in Ohio to destinations in that portion of the State lying northwardly of a line drawn east and west through Columbus, and eastwardly of a

[1] U. S. C. 49, c. 1, § 13 (3), 4.

line drawn north and south through Galion and Sandusky and Columbus. The latter territory is highly industrialized, and great quantities of coal are there consumed for manufacturing and domestic purposes. This comes from the producing districts in eastern Ohio and from those to the east and south in Pennsylvania, West Virginia, Kentucky and adjoining states. The rates are group rates from each mining district; all mines within a single district enjoying the same rate to a given destination. As found by the court below, prior to August 1, 1932, there was maintained what it described as "a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from western Pennsylvania, northern West Virginia, and Ohio coal mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable in view of all the elements which must be considered in rate making". These differentials had been maintained long prior to the year 1932; the rates being based upon that from the Pittsburgh district to Youngstown. With that rate fixed those from more remote producing districts, such as Connellsville, immediately south of the Pittsburgh district, and Fairmont, south of Connellsville, in northern West Virginia, were made by adding a differential; and rates to Cleveland and other more distant destinations also by adding a differential.

In 1932 the Ohio Commission ordered a reduction in the rates from two Ohio producing districts (Middle-Massillon and Ohio No. 8) to Canton and to Massillon. Thereafter the Wheeling & Lake Erie Railway sought and obtained permission to extend the reductions to other destinations. The result was lowered scales to important coal consuming points such as Cleveland and Lorain. The New York Central, the Pennsylvania, the Baltimore & Ohio, and the Pittsburgh & [redacted], as well as the Wheeling & Lake Erie, serve the Ohio producing territory. They resisted the proposed reductions of the Wheeling & Lake Erie, but without success. In order to meet competition, they reduced the rates between No. 8 District in Ohio and northeastern Ohio destinations. Thereafter, in order to preserve rate relationships, the Ohio Commission compelled reductions from mines in the Cambridge, Hocking and Pomeroy districts. Thus, by November 1, 1932, all of the intrastate rates between origins in Ohio and destinations in the territory above mentioned had been substantially lowered. This threw out

of relation the interstate rates from the Freeport, Pittsburgh, Connellsville and Fairmont districts.

Several proceedings before the Interstate Commerce Commission resulted. In September and October, 1932, twelve carriers serving the Ohio districts and other origin territory in Pennsylvania, Maryland and nearby states, complained that the reductions gave an undue advantage and preference to persons and localities in Ohio to the prejudice of persons and localities outside the State, and charged also unreasonable and unjust discrimination against, and undue burden upon, interstate commerce. The Commission ordered an investigation, and named as respondents all railroads operating in Ohio subject to its jurisdiction. Subsequently four complaints were filed on behalf of operators of mines in Pennsylvania, Maryland and West Virginia. These alleged that the reduced Ohio rates in their relation to interstate rates were unduly preferential of Ohio shippers and localities, and unduly prejudicial to interstate shippers and localities, and unjustly discriminated against interstate commerce. Three of the complaints asserted that the interstate rates to northeastern Ohio from mines in the Pittsburgh, Freeport, Connellsville, and Fairmont districts were unreasonable and in violation of Section 1, of the Interstate Commerce Act. After the Ohio rates were reduced the P. & W. Va. Railroad lowered its rates from the ~~Freeport, Pennsylvania, district adjoining the~~ Pittsburgh district ~~on the north~~. The Commission suspended these rates, but by a subsequent order permitted their continuance subject to further investigation. The Complaint cases and the Investigation and Suspension case against the P. & W. Va. Railroad were consolidated with the 13th section investigation and heard upon a single record.

The Commission found that northeastern Ohio is served principally by the Pennsylvania, New York Central, Baltimore & Ohio, Wheeling, and Nickle Plate-Erie system; that all of these carriers participate in the rates and transportation of bituminous coal from the Ohio mines and mines in Pennsylvania, West Virginia, and other states, to the same destination, and that there is a large movement of coal from the Ohio, Pennsylvania and West Virginia mines to northeastern Ohio. From the record it concluded that coal is transported from the Ohio mines to the destinations in question "at intrastate rates which are generally substantially

lower, distance considered, than are the reasonable interstate rates herein provided, under which such coal is moved to such destinations from Pennsylvania and West Virginia"; and that "this disparity in rates is greater than is warranted by differences in transportation conditions from the Ohio mines on the one hand and the Pennsylvania and West Virginia mines on the other."

There was evidence in substantial volume bearing upon the issue of the reasonableness of the existing interstate rates from the Freeport, Pittsburgh, Connellsville and Fairmont districts to the destination territory involved. Much evidence was adduced as to rates approved by the Commission in other proceedings for approximately similar hauls, under similar transportation conditions. The Wheeling & Lake Erie introduced a cost study, and the State and other parties produced evidence as to coal rates in Illinois, fixed by the Commission, and a comparison of the conditions in that territory and those found in Ohio, all for the purpose of demonstrating that the reduced Ohio rates were maximum reasonable rates. There was evidence in opposition to this contention. The testimony showed that coal had moved freely from all producing areas, intrastate and interstate, under the old rates, and tended to prove that the unbalancement of the relation between the state and interstate rates had retarded and prohibited the shipment of a large quantity of coal from the other states to northeastern Ohio. The Commission in its report discusses this evidence in detail, and based upon it, makes findings to the effect that the interstate rates from the Freeport, Pittsburgh, Connellsville and Fairmont districts are reasonable; the system of differentials between the nearer state origins and the more remote interstate origins is proper, distance and other conditions considered; the reduced state rates are unduly preferential of persons and localities in Ohio and unduly prejudicial to persons and localities in the Freeport, Pittsburgh, Connellsville and Fairmont districts; and in order to remove the undue discrimination between persons and localities the intrastate rates should be increased to the former level, and the preexisting interrelationship reestablished.

1. The assertion that appellants were denied a fair hearing rests not upon any refusal to receive evidence tendered, but upon the Commission's alleged misconception of the rules as to burden of proof. It is said that from the outset the Commission acted upon